

# Conversation Contents

Fwd: [EXTERNAL] RE: FBI Interim Release Policy

## Attachments:

/43. Fwd: [EXTERNAL] RE: FBI Interim Release Policy/1.1 NSC Appeal Opinion.pdf  
/43. Fwd: [EXTERNAL] RE: FBI Interim Release Policy/1.2 First NSC decl.pdf  
/43. Fwd: [EXTERNAL] RE: FBI Interim Release Policy/1.3 Second NSC decl.pdf  
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/43. Fwd: [EXTERNAL] RE: FBI Interim Release Policy/3.3 Second NSC decl.pdf  
/43. Fwd: [EXTERNAL] RE: FBI Interim Release Policy/3.4 Third NSC decl.pdf

**Rachel Spector <rachel.spector@sol.doi.gov>**

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**From:** Rachel Spector <rachel.spector@sol.doi.gov>  
**Sent:** Tue Apr 17 2018 05:32:57 GMT-0600 (MDT)  
**To:** cindy\_cafaro@ios.doi.gov  
**Subject:** Fwd: [EXTERNAL] RE: FBI Interim Release Policy  
**Attachments:** NSC Appeal Opinion.pdf First NSC decl.pdf Second NSC decl.pdf Third NSC decl.pdf

Hey Cindy:

This came in yesterday afternoon from FBI. I have not had a chance to review them yet.

Rachel

Sent from my iPad

Begin forwarded message:

**From:** (b) (6), (b) (7)(C) (RMD) (FBI)" (b) (6), (b) (7)(C)@fbi.gov>  
**To:** "Spector, Rachel" <rachel.spector@sol.do\_\_\_\_\_  
**Subject:** RE: [EXTERNAL] RE: FBI Interim Release Policy

Good morning Ms. Spector,

I'm attaching 3 declarations we filed in the National Security Counselors litigation (13-cv-556, DDC). I'm also attaching the Appeal Court's opinion upholding the FBI's 500 pages per month policy. The Appeal Court concluded the FBI's policy was not in violation of the FOIA; the policy is a non-obstructionist; the policy serves to promote efficient responses to a larger number of requesters. I'll be sending other declarations shortly.

Thanks,

(b) (6), (b) (7)(C)  
Unit Chief

RIDS/Litigation Support Unit

(b) (6), (b) (7)(C)

NOTICE: This message is transmitted to you by the FBI Records Management Division, Litigation Support Unit. The message, along with any attachments, may be confidential, law enforcement sensitive, and legally privileged. If you are not the intended recipient of this message, please destroy it promptly without further retention or dissemination (unless otherwise required by law). Please notify the sender of the error by a separate e-mail or by calling (b) (6), (b) (7)(C)

From: Spector, Rachel [mailto:[rachel.spector@sol.doi.gov](mailto:rachel.spector@sol.doi.gov)]

Sent: 4/13/18 8:28 AM

To: (b) (6), (b) (7)(C) (RMD) (FBI) (b) (6), (b) (7)(C) @fbi.gov>

Subject: RE: FBI Interim Release Policy

Hi (b) (6), (b) (7)(C)

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Many thanks,

Rachel

Rachel Spector  
Division of General Law  
Office of the Solicitor  
U.S. Department of the Interior  
(202) 208-6029

----- Forwarded message -----

From: **Rachel Spector** <[rachel.spector@sol.doi.gov](mailto:rachel.spector@sol.doi.gov)>

Date: Sat, Apr 14, 2018 at 7:53 PM

Subject: Re: [EXTERNAL] RE: FBI Interim Release Policy

To: (b) (6), (b) (7)(C) (RMD) (FBI) (b) (6), (b) (7)(C) @fbi.gov>

Cc: (b) (6), (b) (7)(C) (RMD) (FBI) (b) (6), (b) (7)(C) @fbi.gov>

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Sent from my iPad

On Apr 13, 2018, at 4:04 PM (b) (6), (b) (7)(C) (RMD) (FBI) (b) (6), (b) (7)(C) @fbi.gov> wrote:

Rachel—adding (b) (6), (b) (7)(C) our Unit Chief, Litigation Support

OS-2018-000959-00901

(b) (6), (b) (7)(C)

(b) (6), (b) (7)(C)

Assistant Section Chief  
Record/Information Dissemination Section  
FBI Records Management Division

(b) (6), (b) (7)(C)

**From:** Spector, Rachel [<mailto:rachel.spector@sol.doi.gov>]  
**Sent:** Friday, April 13, 2018 1:10 PM  
**To:** (b) (6), (b) (7)(C) (RMD) (FBI) (b) (6), (b) (7)(C) [fbi.gov](mailto:fbi.gov)>  
**Subject:**

Rachel Spector  
Division of General Law  
Office of the Solicitor  
U.S. Department of the Interior  
(202) 208-6029

**"Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>**

---

**From:** "Cafaro, Cindy" <cindy\_cafaro@ios.doi.gov>  
**Sent:** Thu Apr 19 2018 11:50:30 GMT-0600 (MDT)  
**To:** Darrell Strayhorn <darrell.strayhorn@sol.doi.gov>  
**Subject:** Fwd: [EXTERNAL] RE: FBI Interim Release Policy  
**Attachments:** NSC Appeal Opinion.pdf First NSC decl.pdf Second NSC decl.pdf Third NSC decl.pdf

Cindy Cafaro | Departmental Freedom of Information Act Officer | US Department of the Interior

Direct: 202-208-5342 | Main: 202-208-3181

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**Date:** Tue, Apr 17, 2018 at 7:32 AM  
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**Sent:** Friday, April 13, 2018 1:10 PM

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**Sub**

Rachel Spector  
Division of General Law  
Office of the Solicitor  
U.S. Department of the Interior  
(202) 208-6029

**United States Court of Appeals**  
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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Argued September 6, 2016

Decided February 14, 2017

No. 15-5117

NATIONAL SECURITY COUNSELORS AND JEFFREY STEIN,  
APPELLANTS

v.

UNITED STATES DEPARTMENT OF JUSTICE,  
APPELLEE

---

Appeal from the United States District Court  
for the District of Columbia  
(No. 1:13-cv-00556)

---

*Kelly B. McClanahan* argued the cause and filed the  
briefs for appellants.

*Brian P. Hudak*, Assistant U.S. Attorney, argued the  
cause for appellee. With him on the brief was *R. Craig  
Lawrence*, Assistant U.S. Attorney.

Before: BROWN, SRINIVASAN, and WILKINS, *Circuit  
Judges*.

Opinion for the Court filed by *Circuit Judge* SRINIVASAN.

SRINIVASAN, *Circuit Judge*: The Freedom of Information Act generally provides for persons to request the disclosure of records retained by administrative agencies. FOIA also addresses the charging of fees by agencies to process the release of records.

This case involves challenges raised by two separate FOIA requesters to the fees assessed against them by the Department of Justice for processing their requests for records. One requester argues that the fees assessed against him exceed the amounts permitted by the statute. The other contends that its request falls within a statutory waiver of fees for certain disclosures furthering the public's understanding of government operations. The district court denied both claims and awarded summary judgment to the Department. We affirm the district court's rejection of the second requester's argument for a statutory waiver of fees, but we vacate and remand for further proceedings with regard to the first requester's challenge to the amount of fees assessed against him.

## I.

The first fee dispute involved in this case concerns a September 13, 2011, FOIA request submitted to the Federal Bureau of Investigation by appellant Jeffrey Stein. Stein is a columnist and blogger who writes about national security issues. He sought disclosure of “all pages on the internal Federal Bureau of Investigation (‘FBI’) Records Management Division (‘RMD’) website, . . . as well as all documents, images, audio and video files, and any other files posted on the RMD website.” FOIA Request from Jeff Stein to David M. Hardy, Chief, FBI Record/Info. Dissemination Section (Sept. 13, 2011). The FBI, a component of the Department of Justice, responded to Stein's request by releasing, free of

charge, a CD containing an initial 567 pages of responsive material. The agency further conveyed that it had located an additional 21,753 responsive pages, which the agency would produce for Stein on multiple CDs if he paid a fee of \$665. The FBI calculated that fee pursuant to its interim release policy, under which it responds to large document requests by burning a series of CDs, each of which contains a maximum of 500 pages of responsive documents. The agency charges requesters \$15 per CD.

Stein did not pursue any administrative appeal of that initial fee determination within the agency. Instead, he brought an action in district court, claiming that the FBI's fee policies, at least as they apply to large requests like his own, are inconsistent with FOIA.

The second fee dispute involved in this case arises out of two September 19, 2011, FOIA requests submitted to the Department of Justice by appellant National Security Counselors (NSC), a non-profit law firm. One of NSC's requests asked for documents concerning all FOIA cases handled by the Federal Programs Branch of the Department of Justice from 2000 to the present. The other request sought "all sworn declarations made by agency representatives as part of certain FOIA or Privacy Act litigation between 2002-2006, inclusive." FOIA Request from NSC to James M. Kovakas, FOIA/Privacy Act Officer, Dep't of Justice Civil Div. (Sept. 19, 2011). In conjunction with both requests, NSC asked for a waiver of charges under a FOIA provision mandating waiver or reduction of fees for certain disclosures deemed to be in the public interest. 5 U.S.C. § 552(a)(4)(A)(iii). The agency denied NSC's requests for a public-interest fee waiver.



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Stein and NSC brought an action under FOIA against the Department of Justice, contesting the fees assessed against them by the agency. The district court granted summary judgment in favor of the Department. Stein and NSC then brought this appeal.

## II.

We first consider Stein's challenge to the fees assessed by the FBI under its interim release policy for production of multiple CDs containing responsive documents. We review the district court's grant of summary judgment de novo. *See, e.g., Judicial Watch, Inc. v. U.S. Dep't of Justice*, 813 F.3d 380, 383 (D.C. Cir. 2016). We vacate the grant of summary judgment against Stein and remand for further proceedings.

### A.

As a threshold matter, the agency contends that Stein's failure to exhaust administrative remedies precludes judicial review of his challenge to the interim release policy. We are unpersuaded. Because a FOIA requester's failure to exhaust administrative remedies "is not [a] jurisdictional" bar to review, it is within our discretion to entertain Stein's arguments. *Hidalgo v. FBI*, 344 F.3d 1256, 1258 (D.C. Cir. 2003). Although "FOIA's administrative scheme favors treating failure to exhaust as a bar to judicial review," *id.* at 1259, we conclude that, in the specific circumstances of this case, the purposes of the exhaustion doctrine would not be served by declining to hear Stein's claim.

Stein filed this suit along with two other plaintiffs, NSC and an organization called Truthout (which did not join this appeal). While NSC asserted multiple claims, Stein and Truthout raised only one, in which they (together with NSC)

contested the FBI's fees under its interim release policy. Stein did not pursue any administrative appeal of the agency's assessment of fees under that policy, but both NSC and Truthout exhausted their administrative remedies.

We have previously elected to consider the claim of a party who failed to exhaust agency remedies when that party's claim and the claim of someone who did personally exhaust "are so similar that it can fairly be said that no conciliatory purpose would be served" by requiring exhaustion from both parties. *Foster v. Gueory*, 655 F.2d 1319, 1322 (D.C. Cir. 1981); *see also Cellnet Commc'n, Inc. v. FCC*, 965 F.2d 1106, 1109 (D.C. Cir. 1992). Here, when two co-plaintiffs jointly asserting precisely the same claim in the same action did exhaust, we elect to consider Stein's challenge notwithstanding his own failure to exhaust.

To be sure, neither of the co-plaintiffs presently stands alongside Stein in challenging the agency's fees for producing multiple CDs under the FBI's interim release policy: Truthout is not a party to the appeal at all, and NSC, while appealing on other grounds (*see* Part III, *infra*), retains no further stake as to this particular challenge because the FBI has disclosed, free of charge, the documents NSC requested in connection with the claim. Still, the fact remains that both Truthout and NSC exhausted administrative remedies with regard to the same claim brought jointly with Stein's in the same case. In the circumstances, denying review of Stein's companion claim on grounds of his own non-exhaustion would not serve the purposes of requiring administrative exhaustion—i.e., enabling the agency to "function efficiently" and to "have an opportunity to correct its own errors," "afford[ing] the parties and the courts the benefit of its experience and expertise," and "compil[ing] a record which is adequate for judicial review." *Weinberger v. Salfi*, 422 U.S.

749, 765 (1975). We therefore proceed to the merits of Stein's challenge.

B.

The agency submitted a declaration by David Hardy, the Chief of the Record/Information Dissemination Section at the FBI, in which it explained the basis for the \$665 fee assessment against Stein. Hardy Decl. ¶ 26 (Sept. 17, 2013). Under the FBI's interim release policy for large document requests, the FBI includes up to 500 pages of responsive documents on a single CD. Due to the confidential nature of many of its records, the FBI, before burning each CD, runs what it refers to as the "Integrity" protocol, a computer program that scans for "exempt words, names, confidential sources, or classified techniques" in responsive documents. *Id.* ¶ 33(c). For each 500-page CD, the Integrity protocol takes approximately 50 minutes to complete. The Hardy Declaration thus explains that, based on the applicable government pay scale for 50 minutes of operator labor, the "average operator cost for the Integrity process alone is \$39.50." *Id.* ¶ 33(d) n.18. The FBI releases completed CDs to requesters for \$15 apiece, a rate significantly less than the FBI's asserted labor costs for producing each CD. Because the FBI identified 21,753 pages of responsive material in addition to the initial 567-page CD of disclosures, the FBI offered to produce the remaining material on forty-four additional CDs, each containing up to 500 pages, for a total charge of \$660. The final charge of \$665 assessed against Stein includes a \$5 fee for the initial 567-page CD, which the FBI collects only if a requester elects to pay for additional disclosures.

FOIA imposes two salient limitations on the fees an agency can charge requesters. First, fees must "be limited to

reasonable standard charges.” 5 U.S.C. § 552(a)(4)(A)(ii). Second, an agency may recover “only the direct costs of search, duplication, or review.” *Id.* § 552(a)(4)(A)(iv). Stein asserts that the \$665 fee assessed against him under the interim release policy fails both requirements.

Stein first contends that the policy, by limiting the number of pages included on each CD to 500, produces fees exceeding “reasonable standard charges.” There is no dispute that each CD can hold far more than 500 pages of material. Stein demonstrated that the pages responsive to his request likely could have fit onto one CD rather than the forty-four CDs on which the agency proposed to disclose the documents. If the charges assessed under the interim release policy for producing forty-four CDs (rather than one) amounted to an improper inflation of fees “with a view to effectively denying access,” the policy would infringe FOIA. *Nat’l Treasury Emp’s Union v. Griffin*, 811 F.2d 644, 650 (D.C. Cir. 1987).

That is not the case here. The FBI regularly receives FOIA requests encompassing a massive number of responsive documents. Due to the time it takes the agency to run the Integrity protocol, the processing of a large request, if not divided into segments, could substantially delay disclosure to other requesters who seek a smaller number of documents. As explained in the Hardy Declaration, the interim release policy thus aims to enable the FBI “to develop multi-track processing with the goal of responding to more requests.” Hardy Decl. ¶ 33(a). By processing requests in 500-page increments, the policy ultimately “provides more pages to more requesters,” avoiding situations in which “a few, large queue requests monopolize finite processing resources.” *Id.* Far from giving rise to an improper inflation of fees that effectively denies access to requesters, the FBI’s interim

release policy serves to promote efficient responses to a larger number of requesters.

Because the agency has come forward with a reasonable, non-obstructionist explanation for the interim release policy's 500-page-per-CD limitation, that limitation does not result in a violation of FOIA's mandate that agencies recover only "reasonable standard charges." That is true even though the policy may, to some degree, increase the cost of disclosure for large requests. FOIA's reasonable-charge mandate, as Stein concedes, does not require an agency to adopt the lowest-cost method of responding to requests. Nor, relatedly, does that statutory mandate require the FBI to waive its interim release policy on request in individual cases. FOIA does not stand in the way of an agency's formulation and application of a reasonable, generally applicable release protocol. Because the FBI's justifications for its interim release policy relate to the efficient processing of requests, it can permissibly adhere to the standard 500-page limit in the face of a case-specific waiver request even if, as Stein observes, it occasionally exercises its discretion to release CDs containing more than 500 pages (as with the initial 567-page CD released to Stein).

Stein alternatively contends that the fees assessed under the interim release policy exceed the agency's "direct costs of search, duplication, or review." 5 U.S.C. § 552(a)(4)(A)(iv). His argument begins with the proposition that the FBI's estimation of its direct labor costs at \$39.50 per CD rests on an assumption that running the Integrity program requires 50 minutes of employee labor. Stein questions that assumption, arguing that it is unclear how much of the 50-minute time period needed to run the Integrity protocol in fact requires the actual involvement of an FBI operator. For instance, Stein submits, the agency's description of the Integrity program is consistent with a scenario in which an operator initially

activates the software but then sits idly by while the program processes documents with little or no ongoing employee engagement. If that were so, the FBI's labor costs associated with the Integrity program might fall well below the \$15-per-CD charge under the interim release policy. Because the FBI's account of its direct production expenses rests on the labor costs ostensibly associated with running the Integrity program, Stein argues that there remains a genuine issue, precluding the entry of summary judgment against him, concerning whether the agency's fees exceed its direct costs.

We agree with Stein that the Hardy Declaration's explanation of the Integrity program lacks adequate specificity to determine whether, and to what extent, the 50-minute period for running the program involves employee engagement rather than idle time. Of course, FOIA does not require an agency to document its labor or other production costs with the exactitude of minute-by-minute detail. But here, after the agency initially submitted its explanation of labor costs in the Hardy Declaration, which were grounded in its assertion that the Integrity program generally takes 50 minutes to run, Stein raised questions about whether that period involves any meaningful employee engagement. The FBI, despite its awareness of Stein's argument, gave no supplemental information addressing whether the operation of the Integrity program in fact entails any ongoing employee interaction. Given those circumstances, we conclude that there remained a genuine issue, foreclosing the entry of summary judgment, concerning whether the fees assessed by the agency exceeded its direct costs.

The agency notes that Stein's (and his co-plaintiffs') briefing in the district court at one point stated that it "is true" that "running Integrity on a single CD costs more than \$15." We do not read that statement to constitute a binding and

irrevocable concession that the direct costs of producing a single CD exceed the FBI's per-CD charge of \$15. Rather, we understand the statement, considered in context, to come into play only if one assumes that the Integrity process involves no idle time on the part of the operator. Otherwise, Stein's argument to the effect that the Integrity process might involve employee idle time—which Stein repeatedly urged in the district court (including on the next page of the same brief), and which necessarily calls into question whether the direct costs of producing a CD exceed the per-CD charge of \$15—would have been an entirely self-defeating one. Consequently, there remains a genuine issue of material fact concerning whether the direct costs of producing a CD exceed \$15.

In so ruling, we in no way mean to call into question the possibility that the agency will adequately demonstrate on remand that the FBI's labor (or other direct) costs under the interim release policy in fact equal or exceed \$15 per CD. Indeed, the agency might be able to do so in short order. We require only that the agency provide a sufficient factual basis upon which the district court can make the determination that the fees assessed under the interim release policy do not exceed direct costs.

### III.

We turn now to the second fee dispute at issue in this case, arising from NSC's requests for records concerning (i) post-2000 FOIA cases handled by the Department of Justice's Federal Programs Branch and (ii) sworn declarations made by Department representatives in connection with certain FOIA and Privacy Act litigation between 2002 and 2006. NSC claims entitlement to a waiver of fees for those requests pursuant to FOIA's provision establishing a waiver or

reduction of fees for certain disclosures in the public interest.  
5 U.S.C. § 552(a)(4)(A)(iii).

A waiver or reduction of fees under that provision rests on satisfaction of two requirements. First, a requester must show that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” *Id.* Second, a requester must show that disclosure is not “primarily in [its] commercial interest.” *Id.* Because the Department here concedes that NSC lacks any overriding commercial interest, the first requirement alone is in dispute. As to that requirement, the district court agreed with the Department that disclosure to NSC was unlikely to contribute significantly to public understanding of the government’s operations or activities. Limiting ourselves “to the record before the agency,” *id.* § 552(a)(4)(A)(vii), we review the denial of NSC’s fee-waiver request de novo, and affirm.

While fee-waiver applications are to be “liberally construed” in favor of finding that requesters meet FOIA’s two-prong test, requesters still must justify their entitlement to a waiver of fees in “reasonably specific” and “non-conclusory” terms. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003). Because NSC failed to provide adequate evidence suggesting that it would effectively disseminate its requested information in furtherance of the public’s understanding of government operations, we find that NSC failed to carry its burden to demonstrate its entitlement to a waiver of fees.

As we have explained, although a fee-waiver applicant need not demonstrate its ability to reach a “wide audience,” it must at least show that it can “disseminate the disclosed



records to a reasonably broad audience of persons interested in the subject.” *Cause of Action v. FTC*, 799 F.3d 1108, 1116 (D.C. Cir. 2015) (quoting *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 815 (2d Cir. 1994)). Here, we agree with the Department that, based on the state of NSC’s website at the time of its FOIA requests, it appeared to be “no more tha[n] . . . a clearing house for the records [it] receive[d]” through FOIA. Denial Letter from James M. Kovakas, FOIA/Privacy Act Officer, Dep’t of Justice Civil Div., to Kel McClanahan, Exec. Dir., NSC (Oct. 17, 2011); see *Home Page*, Nat’l Sec. Counselors (Sept. 20, 2011), <https://web.archive.org/web/20111104000523/http://nationalsecuritylaw.org>. In addition, the Department correctly noted that NSC did “not appear [to be] actively engaged in gathering information to produce” original publications, as “[t]he ‘NSC Publications’ section of [its] website contains only three publications, two of which were written . . . prior to NSC’s existence.” Denial Letter on Administrative Appeal from Janice Galli McLeod, Assoc. Dir., Dep’t of Justice Office of Info. Policy, to Kel McClanahan, Exec. Dir., NSC (May 22, 2012).

NSC, moreover, produced no information about the size of its audience or the amount of traffic received by its website. NSC’s own stated plans about its intended use of the tens of thousands of pages of records encompassed by its request indicated only that it hoped to perform “unbiased analyses,” “develop a predictive model,” “or at least write a white paper.” FOIA Requests from NSC to James M. Kovakas, FOIA/Privacy Act Officer, Dep’t of Justice Civil Div. (Sept. 19, 2011). It further suggested that “the raw statistical data mined from these records . . . would prove valuable to any person attempting to model the respective agencies’ FOIA implementation procedures, policies, patterns, and practices.” *Id.* NSC neither identified a

discernible audience for the disclosures in their raw form nor demonstrated its possession of the requisite scientific or technical sophistication to analyze and convey the data in a more broadly digestible form.

We have previously upheld a denial of a fee-waiver request in circumstances in which a requester “failed to identify the newspaper company to which he intended to release the requested information, his purpose for seeking the requested material, or his professional or personal contacts with any major newspaper companies.” *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988). Here, while NSC provided some barebones indication of how it intended to use its requested information, it similarly failed to provide sufficiently specific and non-conclusory statements demonstrating its ability to disseminate the disclosures to a “reasonably broad audience of persons interested in the subject.” *Cause of Action*, 799 F.3d at 1116. That deficiency “alone is a sufficient basis for denying the fee waiver request.” *Larson*, 843 F.2d at 1483. We therefore affirm the denial of NSC’s request for a public-interest fee waiver.

\* \* \* \* \*

For the foregoing reasons, we vacate the district court’s grant of summary judgment with respect to Stein’s claim and remand for further proceedings consistent with our opinion. We affirm the district court’s grant of summary judgment in favor of the Department in connection with NSC’s request for a public-interest fee waiver.

*So ordered.*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL SECURITY COUNSELORS, *et al.*,

Plaintiffs,

v.

Civ. A. No. 1:13-cv-00556-RC

DEPARTMENT OF JUSTICE,

Defendant.

### DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am the Section Chief of the Record/Information Dissemination Section ("RIDS"), Records Management Division ("RMD"), in Winchester, Virginia. I have held this position since August 1, 2002. Prior to my joining the Federal Bureau of Investigation ("FBI"), from May 1, 2001 to July 31, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act ("FOIA") policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the State of Texas since 1980.

(2) In my official capacity as Section Chief of RIDS, I supervise approximately 268 employees who staff a total of ten (10) FBI Headquarters ("FBIHQ") units and two (2) field operational service center units whose collective mission is to effectively plan, develop, direct, and manage responses to requests for access to FBI records and information pursuant to the FOIA

as amended by the OPEN Government Act of 2007 and the OPEN FOIA Act of 2009; Privacy Act of 1974; Executive Order 13526, Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. Specifically, I am aware of the treatment that has been afforded National Security Counselor's FOIA request for the Manual of Administrative Operations and Procedures ("MAOP"), as well as RIDS's decisions about fees with respect to all three FOIA requests at issue in this lawsuit. I am also aware of the protocol adopted and followed by RIDS for assessing and charging fees associated with the processing of FOIA requests, and specifically the policy for charging fees associated with the production of responsive records on compact discs ("CDs").

(4) This declaration is being submitted in support of defendant's motion for summary judgment.

**FOIPA REQUEST NUMBER 1148707 - REQUEST FOR THE MAOP**

(5) By e-mail dated May 19, 2010, plaintiff National Security Counselors ("NSC") submitted a FOIA request for an electronic copy of the MAOP and requested a fee waiver. (*See Exhibit A.*)

(6) This request was assigned FOIPA Request Number 1148707-000. The FBI denied NSC's request for a fee waiver.

(7) Although the FBI initially advised NSC that it would be required to pay \$15.00 for release of the MAOP on CD, the FBI subsequently determined that it maintained a pre-processed copy of the MAOP that it would provide free of charge.<sup>1</sup> Consequently, on June 11, 2010, the FBI released a copy of the MAOP to NSC on one CD.<sup>2</sup> The CD contained a copy of the MAOP from 1998 that had been previously processed in response to another request. **(See Exhibit B.)**

(8) By e-mail dated June 16, 2010, the FBI's Public Information Officer ("PIO") responded to a question from counsel for NSC about the quality of the version of the MAOP released on June 11<sup>th</sup>. The PIO advised that the quality was consistent with the version of the MAOP in the FBI's FOIA reading room but explained that he would check with RIDS's Work Process Unit to determine whether there was an updated version of the MAOP that was of better quality that could be provided to NSC. **(See Exhibit C.)**

(9) On June 17, 2010, the FBI released another copy of the MAOP to NSC on one CD. This CD contained a copy of the MAOP from 2007 that had been previously processed in response to another request. Because this was a pre-processed version of the MAOP, the FBI did not assess any fees for its release.<sup>3</sup> **(See Exhibit D.)**

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<sup>1</sup> The FBI was able to provide the pre-processed version free of charge because the cost to re-copy the document onto a CD and release it to NSC was minimal. In particular, the information security steps normally required to produce information to a requester had already been completed when the document was originally processed and released, and did not need to be repeated for this release. See ¶ 33(c) – (d) *infra*.

<sup>2</sup> The release letter was inadvertently dated July 11, 2010. It was actually mailed on or about June 11, 2010.

<sup>3</sup> As a non-commercial requester, NSC is entitled to the first 100 pages of duplication (or the cost equivalent) free of charge. See 28 C.F.R. § 16.11(d)(3)(i). Thus, while the FBI charges \$15.00 for release of records on a CD, we gave

(10) By e-mail dated June 22, 2010, counsel for NSC contacted the FBI's PIO concerning its release dated June 17, 2010, to verify that the version he had received was the most current version of the MAOP and to inquire about receiving a Table of Contents for that version. (See Exhibit E.)

(11) In a separate e-mail exchange on June 23, 2010, the FBI's PIO and NSC again corresponded about which version of the MAOP was released to plaintiff on June 17<sup>th</sup> and about receiving the Table of Contents. (See Exhibit F.)

(12) On February 8, 2011, the FBI provided NSC a copy of the MAOP's Table of Contents in its entirety under FOIPA Request Number 1148707-001.<sup>4</sup> Because this Table of Contents consisted of 49 pages and requesters are entitled to the first 100 pages of duplication for free pursuant to 28 C.F.R. § 16.11(d)(3)(i), no fees were charged for this release. (See Exhibit G.)

(13) Additionally, the FBI re-opened NSC's file to respond to its request for the most current version of the MAOP. By letters dated February 18, 2011, the FBI advised NSC that it had assigned the request FOIPA Request Number 1148707-002, and also that it had denied NSC's request for a fee waiver.<sup>5</sup> NSC was informed that it could appeal the FBI's fee waiver denial by filing an administrative appeal with the Department of Justice ("DOJ"), Office of Information

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Stein a \$10.00 credit to represent the 100 free pages to which he is entitled. Furthermore, the remaining \$5.00 he owed could not be recouped at that time because the minimum fee that can be charged is \$14.00. See 28 C.F.R. § 16.11(d)(4)-(5).

<sup>4</sup> When the MAOP from 2007 was previously processed, the Table of Contents was not included. Therefore, when the pre-processed version was provided to NSC, it did not include the Table of Contents.

<sup>5</sup> Because this version of the MAOP had not been previously processed, NSC's request was subject to the standard duplication charges associated with processing FOIA requests.

Policy ("OIP") within sixty (60) days. (*See Exhibit H.*)

(14) By letter dated February 24, 2011, the FBI advised NSC that it located approximately 2038 pages of material potentially responsive to its request for the most current version of the MAOP, and the FBI requested NSC's commitment to pay \$65.00 (for release on five CDs), within thirty days from the date of its letter. (*See Exhibit I.*)

(15) NSC did not respond to the FBI's request that it commit to pay the fees associated with the processing of its FOIA request and after waiting 30 days for a response, the FBI closed the request.

(16) By letter dated October 5, 2011, NSC submitted an appeal to OIP regarding the FBI's denial of its fee waiver request and the FBI's fee estimate/assessment.<sup>6</sup> (*See Exhibit J.*)

(17) By letter dated December 9, 2011, OIP acknowledged NSC's appeal and assigned it Appeal Number AP-2012-00784. (*See Exhibit K.*)

(18) By letter dated May 23, 2012, OIP affirmed the FBI's fee waiver denial and upheld the FBI's fee policy of charging \$15.00 per CD containing 500 pages of records. (*See Exhibit L.*)

(19) On April 24, 2013, plaintiffs NSC, Jeffrey Stein, and Truthout filed the present lawsuit. *See* Dkt. No. 1. Among other things, plaintiffs challenged the FBI's denial of a fee

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<sup>6</sup> I have learned in connection with this litigation that OIP apparently agreed to provide NSC an extension beyond 60 days to submit this appeal. The FBI was not notified of this extension. RIDS did not pull a copy of the MAOP as it existed in 2011 into its FOIA Document Processing System because the request for the manual was never perfected due to NSC's failure to respond within 30 days to the FBI's February 24, 2011 letter, and because the FBI did not receive any notice about an appeal being filed within 60 days (or about the extension that had been granted by OIP). The FBI's records show that we received notice of the appeal on or about December 9, 2011. Because the MAOP has been undergoing constant revision since March 2008 that has reduced the size of the document (as discussed in paragraph 21 below), an intact copy of the MAOP referenced in the February 24, 2011 letter no longer is accessible. *See* footnote 8 *infra*.

waiver request for NSC with respect to its request for the MAOP in FOIPA Request Number 1148707-002 and sought an order for the FBI to release a current version of the MAOP to NSC at no charge. *See* Dkt. No. 1 at ¶¶ 30 and 40 and footnote 1.<sup>7</sup>

(20) In an effort to narrow the issues in dispute in the pending lawsuit, the FBI processed and released the version of the MAOP as it existed on July 2, 2013 to NSC on a single CD at no charge. The FBI made this release on July 25, 2013. The FBI reviewed 495 pages<sup>8</sup> and released all of them in whole or in part.<sup>9</sup> (*See Exhibit M.*)

(21) The FBI has been reviewing and replacing the MAOP with Corporate Policy Office Directives and Policy Implementation Guides since March 2008. As new policy documents are approved, the appropriate sections of the MAOP are updated on the FBI's intranet, where the MAOP is maintained.<sup>10</sup> (*See Exhibit M.*) The replacement of the MAOP with Corporate Policy Office Directives and Policy Implementation Guides has reduced the size of the

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<sup>7</sup> Plaintiffs suggest that they would not challenge any withholdings the FBI made upon releasing a current version of the MAOP. *See* Dkt. No. 1 at footnote 1.

<sup>8</sup> The FBI initially estimated that the number of potentially responsive pages of the MAOP was 2038. *See* ¶ 14 *supra*. We have concluded that this initial estimate was inaccurate. RIDS obtained the numbers it used to reach that estimate from the intranet page where the MAOP is maintained. That page contained hyperlinks for the various parts of the MAOP, after which there was a number in parenthesis – *i.e.*, “Introduction (1)”; “Part I (1178)”; and “Part II (814).” RIDS concluded that these numbers represented the number of pages in each part of the MAOP. Adding these numbers together, and then adding the number of pages for the Table of Contents, RIDS arrived at the 2038 page estimate. The FBI has since concluded that the numbers in parentheses were outdated and had not been updated to reflect changes to the MAOP that have reduced its size. Thus, the FBI does not believe that the numbers in parentheses that were relied on in making the 2038 page estimate represented the actual number of pages in the MAOP at that time.

<sup>9</sup> A Table of Contents for the MAOP no longer exists, so the FBI produced an index listing all of the sections of the MAOP instead.

<sup>10</sup> The FBI is maintaining copies of the sections of the MAOP that have been superseded and replaced by Corporate Policy Office Directives and Policy Implementation Guides, but does not have an intact copy of the MAOP as it existed in 2011.



MAOP from approximately 1949 pages in the 2007 version of the MAOP (excluding the Table of Contents) to 495 pages in the version of the MAOP as it existed on July 2, 2013 that has been released to NSC.

(22) The FBI has determined that it is not required to pro-actively post the most up-to-date version of the MAOP in its electronic FOIA reading room – *i.e.*, *The Vault* – even though the FBI previously posted, at its discretion, a copy of the MAOP from 2007. First, the MAOP governs internal personnel matters (such as merit promotions, transfers, and disciplinary matters), resource management, training, and the like. Accordingly, the FBI has determined that it is not a staff manual that affects a member of the public. *See* 5 U.S.C. § 552(a)(2)(C). Second, the FBI has concluded that it is not a frequently requested record that must be posted pursuant to 5 U.S.C. § 552(a)(2)(D). The FBI traditionally does not receive a significant number of requests for the MAOP in any given year. For example, in FY2010, the FBI received two requests for the MAOP (including NSC’s request), and only one request for it in both FY2011 and FY2013. In FY2012, the FBI did not receive any requests for it. Considering that the FBI received more than 14,000 requests in each of these years, one or two requests for the MAOP per year is not “frequent.”<sup>11</sup>

#### **FBI’S ASSESSMENT OF FEES FOR RELEASES ON CDs**

##### **FOIPA Request Number 1148707-002**

(23) As explained in paragraphs 10 – 20 *supra.*, the FBI initially estimated that the

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<sup>11</sup> As explained in paragraph 21 *supra.*, the MAOP is undergoing regular and continuing revision. Consequently, the manual regularly changes and a single, static “version” does not exist from year-to-year. (Indeed, a single, static version often does not exist from quarter-to-quarter within a particular year.) Thus, the MAOP as it existed in FY2010 is not the same document that existed in FY2011 or FY2013, and the FBI accordingly considers the requests in FY2010, FY2011, and FY2013 to be requests for different documents rather than multiple requests for the same document.

version of the MAOP existing in February 2011 consisted of approximately 2038 pages and asked that NSC commit to pay \$65.00 for release on five CDs. (*See Exhibit I, supra.*) NSC did not commit to pay those fees and submitted an appeal to OIP, challenging the FBI's denial of its fee waiver request as well as the FBI's policy of charging \$15.00 per CD containing 500 pages. (*See Exhibit J, supra.*) OIP affirmed the FBI's denial of NSC's fee waiver request and upheld its fee policy regarding production of records on CDs. (*See Exhibit L, supra.*) Nevertheless, the FBI ultimately provided NSC a version of the MAOP current to July 2, 2013 at no charge. (*See Exhibit M, supra.*) In the end, the FBI released three versions of the MAOP to NSC, but did not charge NSC for any of those three copies. *See ¶¶ 7, 9, and 20 supra.*

**FOIPA Request Number 1173246**

(24) On or about September 13, 2011, plaintiff Jeffrey Stein ("Stein") submitted a FOIA request for "a copy of all pages on the internal FBI [Records Management Division] website..." and asked for a fee waiver. (*See Exhibit N.*)

(25) By letter dated September 15, 2011, the FBI acknowledged receipt of Stein's FOIA request and assigned it FOIPA Request Number 1173246-000. (*See Exhibit O.*)

(26) By letter dated September 27, 2012, the FBI made its first interim release to Stein. This release was on one CD and contained 567 pages of responsive material. The FBI did not charge Stein for this release.<sup>12</sup> The FBI also informed Stein that approximately 21,753 additional pages of responsive material had been identified and explained that, assuming all 21,753 pages

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<sup>12</sup> As a non-commercial requester, Stein is entitled to the first 100 pages of duplication (or the cost equivalent) free of charge. *See* 28 C.F.R. § 16.11(d)(3)(i). Thus, while the FBI charges \$15.00 for release of records on a CD, we gave Stein a \$10.00 credit to represent the 100 free pages to which he is entitled. Furthermore, the remaining \$5.00 he owed could not be recouped at that time because the minimum fee that can be charged is \$14.00. *See* 28 C.F.R. § 16.11(d)(4)-(5).

were released, he would owe \$2175.30 in duplication costs for paper copies or \$665.00 for production on CDs (*i.e.*, 44 CDs at \$15.00 apiece plus the \$5.00 owed from the first release as explained in footnote 12, *supra.*). The FBI denied Stein's request for a fee waiver and offered him the opportunity to reduce the scope of his request in order to reduce the fees associated with its processing. The FBI requested that Stein contact RIDS about narrowing the scope of his request or commit to paying the estimated fees within thirty days of the date of the September 27<sup>th</sup> letter. Finally, the FBI notified Stein of his right to file an administrative appeal with OIP. (*See Exhibit P.*)

(27) Stein did not contact RIDS to discuss narrowing the scope of his request, nor did he commit to paying the estimated fees. He also did not file an appeal with OIP regarding the FBI's fee waiver denial, assessment of fees, or any other matter related to the FBI's September 27<sup>th</sup> release. Because Stein did not respond to the September 27<sup>th</sup> letter within 30 days, the FBI closed this request.

**FOIPA Request Number 1197184**

(28) By e-mail dated May 22, 2012, Jason Leopold on behalf of Truthout ("Truthout") submitted a FOIA request for records concerning the "FBI's Campus Liaison Initiative." Truthout agreed to pay up to \$500.00 for the requested information. (*See Exhibit Q.*)

(29) By letter dated August 17, 2012, the FBI acknowledged receipt of Truthout's request, which it assigned FOIPA Request Number 1197184-000. In a separate letter dated August 17, 2012, the FBI advised Truthout that approximately 26,000 pages material responsive to its request had been located, and explained that, assuming all pages were released, duplication

costs for paper copies would be \$2590.00 and for CDs would be \$765.00 (*i.e.*, 52 CDs at \$15.00 apiece).<sup>13</sup> The FBI asked that Truthout commit to pay the estimated fees within 30 days of the date of letter. (*See Exhibit R.*)

(30) By letter dated September 7, 2012, Truthout submitted an appeal to OIP regarding the FBI's August 17, 2012 determination. In its appeal letter, Truthout committed to paying \$765.00 for release on CDs if its appeal was unsuccessful but reserved the right to seek judicial review if it did not prevail in its appeal of the FBI's fee determination. (*See Exhibit S.*)

(31) By letter dated September 26, 2012, OIP acknowledged Truthout's appeal and assigned it Appeal Number AP-2012-03398. (*See Exhibit T.*)

(32) By letter dated March 12, 2013, OIP advised Truthout that due to pending litigation, it was closing Appeal Number AP-2012-03398.<sup>14</sup> (*See Exhibit U.*)

**Explanation of the FBI's Policy Concerning Assessment of Fees for Releases on CDs**

(33) On or about January 2010, RIDS instituted a policy of processing and releasing 500 pages per CD for medium-queue and large-queue requests and charging \$15.00 per CD (hereinafter, the "policy"). The FBI's policy derives from and/or is the FBI's effort to comply with DOJ FOIA regulations at 28 C.F.R. § 16.5(b) (regarding the prompt disclosure of responsive material upon payment of any applicable fees); 28 C.F.R. § 16.6(b) (regarding notifications to requesters about fees associated with the processing of their requests); and 28 C.F.R. §

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<sup>13</sup> Both estimates included a \$10.00 discount for the first 100 pages of material (or cost equivalent). *See* 28 C.F.R. § 16.11(d)(3)(i).

<sup>14</sup> Plaintiffs' challenge to the FBI's fee policy regarding CDs was originally part of *Shapiro et al. v. DOJ*, Civ. No. 12-cv-1883 (D.D.C.) (BAH), which was filed in November 2012. The Court ordered that the allegations in that case be severed on April 17, 2013, after which plaintiffs filed this lawsuit.

16.11(c)(2) (regarding duplication fees for releases produced by computer). The rationale for the FBI's policy concerning assessment of fees for FOIA releases on CDs is four-fold:

(a) First, the policy is based on sound FOIA business practice. FOIA encourages agencies to develop multi-track processing with the goal of responding to more requests. Accordingly, RIDS established three processing queues—small (500 pages or less), medium (501-2,500 pages), and large (more than 2,500 pages). Within each queue, requests are processed in first-in, first-out (“FIFO”) order. By making interim releases in 500-page increments, RIDS regularly provides more pages to more requesters across the three queues, thus avoiding a system where a few, large queue requests monopolize finite processing resources resulting in less pages provided to fewer requesters on a more infrequent basis.

(b) Second, the policy promotes both RIDS and requester efficiencies. RIDS processes responsive records in 500-page increments, meaning that 500 pages are reviewed for release and once all security protocols are run, a CD is prepared; then the next 500 pages are reviewed and prepared for release; and so on until all responsive pages are reviewed and released. By working in 500-page increments, RIDS has found that more pages get processed, reviewed, and released to more requesters each month. In terms of managing work-flow, the interim releases can be assigned to multiple processors and the 500-page size has proven to be ideal for reviewing officials, subject matter experts, and other components or agencies that must be consulted before release. Moreover, maintaining a steady interim release posture is key to meeting the demands posed by the growing number, size, and complexity of FOIA/PA requests

received by the FBI.<sup>15</sup>

(c) Third, part of the process of finalizing material for release involves information security. Because many FBI records contain classified information, FBI FOIA/Privacy Act requests are processed on a classified computer network. Therefore, when a CD is prepared for release after review and consultation, it must also undergo a multi-step information security review. Specifically, the FBI employs a security software application (“Integrity”) that must be employed every time information is taken from the classified network and released to a requester in an unclassified format. This entails running a general security protocol, whereby Integrity scans for prescribed code words; and an individualized protocol, whereby Integrity scans for words that RIDS determines are unique to the particular request and may include searches for specific exempt words, names, confidential sources, or classified techniques. In this regard, the 500-page size has likewise proven ideal in maintaining a steady release flow. The running of these security protocols, and resolving any issues that may arise, can require a significant amount of effort and time that increases as more pages are added. Therefore, putting more pages on each CD would impose additional security protocol burdens and slow processing time.<sup>16</sup>

(d) Fourth, the policy promotes access as non-exempt information is processed

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<sup>15</sup> RIDS received 14,957 FOIA/PA requests in FY 2010; 15,335 requests in FY 2011; and 20,602 requests in FY 2012. RIDS processed 14,665 FOIA/PA requests in FY2010; 17,045 requests in FY2011; and 20,029 requests in FY2012. The average number of pages processed per request was 939 pages in FY2010; 1742 pages in FY 2011; and 1007 pages in FY2012.

<sup>16</sup> When a FOIA requester seeks a document that already has been processed and released in response to a prior request – such as NSC’s request for the 2007 MAOP – the already processed document does not need to be processed again on the classified network, which substantially reduces the costs to the FBI. *See* ¶ 33(d) *infra*. Thus, the 2007 MAOP was released to NSC without charge.

and released on a recurring basis contingent on payment, if applicable. Requesters benefit from the favorable cost structure. The FBI has not passed all of the direct costs of preparing a CD for release – including the cost of operator time – to requesters, although we are authorized to do so under 28 C.F.R. § 16.11(c)(2).<sup>17</sup> As explained above, all documents must be scanned through Integrity before they can be released. This scan is part of the duplication process by which the FBI moves records from its electronic FOIA Document Processing System onto CDs for release, for which the FBI can recoup all direct costs pursuant to 28 C.F.R. § 16.11(c)(2). The cost of running the Integrity protocols for a CD release alone exceeds the assessed \$15.00 per CD fee.<sup>18</sup> Moreover, the \$15.00 per CD cost is more favorable to the requester than the ten cents per page fee for paper photocopies.<sup>19</sup>

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<sup>17</sup> The cost for the CD itself is nominal.

<sup>18</sup> In the majority of instances, the RIDS employees who are responsible for setting up and running the Integrity scans range in grade from GS-11 to GS-13. Based on the 2013 Salary Table issued by the Office of Personnel Management for the Washington D.C. locality (in which RIDS is located), the minimum hourly salary for a RIDS employee running Integrity is \$29.93 per hour (GS-11, Step 1) and the maximum hourly salary for a RIDS employee running Integrity is \$55.46 per hour (GS-13/Step 10). See <http://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2013/general-schedule/washington-baltimore-northern-virginia-dc-md-va-wv-pa-hourlyovertime-rates-by-grade-and-step/>. In RIDS's experience, it generally takes approximately 50 minutes to set up and run the Integrity scan for 500 pages. Therefore, assuming that it takes 50 minutes to set up and run Integrity:

- The minimum operator cost for the Integrity process alone is \$24.50.
- The maximum operator cost for the Integrity process alone is \$46.00.
- The average operator cost for the Integrity process alone is \$39.50.

The amount of time it takes to set up and run Integrity increases as more pages are added that need to be scanned and/or as more search terms are added to the Integrity search protocol. Moreover, the costs listed above do not include the costs associated with re-running the scan after any corrections that need to be made.

<sup>19</sup> For example, if the response to a request consisted of 500 pages of material, then it would cost a non-commercial requester \$40.00 for paper copies. Non-commercial requesters are entitled to the first 100 pages of material at no cost. Thus, the requester in this example would be required to pay ten cents per page for 400 pages, or \$40.00. See 28 C.F.R. § 16.11(d)(3)(i). In contrast, under the FBI's CD fee policy, the requester in this example would not owe anything. Pursuant to DOJ's FOIA regulations, the minimum fee that can be collected is \$15.00. See 28 C.F.R. § 16.11(d)(4)-(5) (fees totaling \$14.00 or less cannot be recouped). The FBI provides a \$10.00 discount (the equivalent of 100 pages at ten cents per page) for the first CD, see 28 CFR § 16.11(d)(3), leaving a balance of only \$5.00, which

(34) All four of these factors work together jointly to form the basis for RIDS's policy.

(35) Plaintiffs have tried to avoid having to pay for more than one CD by instructing the FBI not to make interim releases and to instead make only one release once all responsive records have been processed. As noted in paragraph 33, however, the practice of making interim releases not only benefits requesters, but is also an efficient way for RIDS to manage its significant workload. The FBI has determined that altering its policy to suit the personal preferences of plaintiffs or any of the thousands of other requesters seeking information from the FBI would not be feasible or efficient and would disrupt RIDS' ability to process the high volume of requests that are received in a manner that is most beneficial for FOIA requesters as a whole.

#### CONCLUSION

(36) As described above, the FBI has fulfilled NSC's request for a current version of the MAOP by releasing a copy of the manual current as of July 2, 2013 on one CD free of charge. Furthermore, the FBI's policy of charging \$15.00 per CD containing 500 pages of records is an appropriate and reasonable assessment of duplication fees, and is consistent with the FOIA, 5 U.S.C. § 552(a)(4)(A)(ii) and DOJ's FOIA fee regulation at 28 C.F.R. § 16.11.

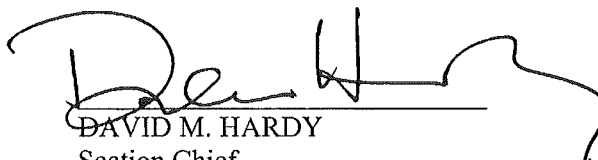
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is below the minimum that the FBI can recoup. If we increase the number of responsive pages in this example to 1000, then the requester would owe \$90.00 for paper copies but only \$20.00 to receive the records on CD (the \$5.00 balance for the first CD and \$15.00 for the second CD).



Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, and that Exhibits A through U attached hereto are true and correct copies.

Executed this 17<sup>th</sup> day of September, 2013.

A handwritten signature in black ink, appearing to read 'D. Hardy', is written over a horizontal line.

DAVID M. HARDY

Section Chief

Record/Information Dissemination Section

Records Management Division

Federal Bureau of Investigation

Winchester, Virginia

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
		)	
Plaintiffs,		)	
		)	
v.		)	Civ. A. No. 1:13-cv-00556-RC
		)	
DEPARTMENT OF JUSTICE,		)	
		)	
Defendant.		)	
<hr/>		)	

EXHIBIT A

**Sobonya, David P.**

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**From:** Kel McClanahan, Esq. [kel@nationalsecuritylaw.org]  
**Sent:** Wednesday, May 19, 2010 2:45 AM  
**To:** FOIPA\_Request  
**Subject:** Form Returned: efoia.pdf  
**Attachments:** efoia.pdf

Form Returned: efoia.pdf

The attached file is the filled-out form. Please open it to review the data.

5/19/2010

OS-2018-000959-00934

### **FBI eFOIA Request Form**

#### **Instructions:**

- 1) Please use this form only to request information about an organization, a business, an investigation, a historical event, an incident, or a group. **This form should not be used to submit Privacy Act requests for information about yourself or another living person.**
- 2) Required fields are marked. If you do not enter accurate and complete information, we may not be able to process your request.
- 3) After filling out the information, submit your request electronically by clicking the SUBMIT button at the bottom of the page. Please note: This is not a secure form, and we cannot guarantee the confidentiality of communications sent via the Internet.
- 4) You also have the option of typing your information into this form, printing it, and: (1) faxing it to (540) 868-4995/4996/4997; or (2) mailing it to **FBI, FOI/PA Request, Record/Information Dissemination Section, 170 Marcel Drive, Winchester, VA 22602-4843**. You can also e-mail the information to [foiparequest@ic.fbi.gov](mailto:foiparequest@ic.fbi.gov).
- 5) For more information on how to prepare and submit your request, please call the FOIA Requestor Service Center at (540) 868-1535 or see the Requesting FBI Records webpage: [http://foia.fbi.gov/requesting\\_records.html](http://foia.fbi.gov/requesting_records.html)

**Dear FOIA Officer:**

This is a request filed under the Freedom of Information Act.

#### **Reasonably Describe the Records**

Describe the records you are requesting. Be as specific as possible with regard to names, dates, places, events, subjects, etc. Please include any known file designations or descriptions for the records you seek.

Bear in mind that the FBI was not established until 1908 and has very few records prior to the 1920s. The Freedom of Information Act clearly states that records must exist at the time the request is submitted to be considered.

**Enter description:** You must submit a separate request for each subject: (Required)  
Describe Subject/Incident of Request. Give Time Frame (if applicable).

An electronic copy of the MAOP

**Type of Requestor**

Please provide information about yourself and the purpose of your request to help us determine your fee category: (Required)

Non-profit national security law education and legal aid organization

**Fees and Fee Waivers**

Your request must include a statement that:

- (1) You agree to pay any fees that may be incurred to process the request;
- (2) Stipulates an amount you are willing to pay; or
- (3) Requests a specific waiver or reduction of fees.

Please select the statement that applies: (Required)

I agree to pay all applicable fees. ☐

I agree to pay up to a specific amount for fees. ☐ (Enter dollar amount)

I request a waiver or reduction of fees. ☒

Explanation for request of waiver or reduction of fees:

Will make the MAOP publicly available on our website for free download

**Expedited Processing**

If you are seeking expedited processing, please choose one of the options below and provide a justification.

I believe a compelling need exists to warrant expedited processing because there is an imminent threat to the life or physical safety of an individual. ☐

I believe a compelling need exists to warrant expedited processing because there is an urgency to inform the public concerning actual or alleged federal government activity (Note: This option is available ONLY for requestors primarily engaged in disseminating information). ☐

Please provide your specific justification for expedited processing:

Thank you for your consideration of my request.

Sincerely,

Title: (Mr. Mrs. Miss, etc.) Mr.

Name: (Required) Kel McClanahan

Organization: (Required if applicable)

National Security Counselors

Street Address: (Required)

1200 S Courthouse Rd Suite 124

City: (Required) Arlington

State: (Required if applicable) VA

Or Country: (Required if applicable) USA

ZIP or Postal Code: (Required) 22204

Phone #1: 301-728-5908

Phone #2:

Fax Number:

E-mail address: kel@nationalsecuritylaw.org

Secondary address:

**Submit**

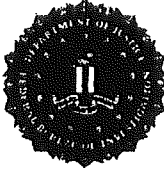
**Print Page**

**Clear Information**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
		)	
Plaintiffs,		)	
		)	
v.		)	Civ. A. No. 1:13-cv-00556-RC
		)	
DEPARTMENT OF JUSTICE,		)	
		)	
Defendant.		)	
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EXHIBIT B



U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535

July 11, 2010

*June*

MR. KEL MCCLANAHAN  
NATIONAL SECURITY COUNSELORS  
SUITE 124  
1200 SOUTH COURTHOUSE ROAD  
ARLINGTON, VA 22204

FOIPA Request No.: 1148707- 000  
Subject: MAOP

Dear Mr. McClanahan:

The records that you have requested were previously processed under the provisions of the Freedom of Information Act for another requester.

Enclosed is 1 CD pertaining to your request and a copy of the explanation of exemptions.

You may file an appeal by writing to the Director, Office of Information Policy (OIP), U.S. Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-0001. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIPA Request Number assigned to your request so that it may be identified easily.

Very truly yours,

A handwritten signature in black ink, appearing to read "D. Hardy", is written over the typed name.

David M. Hardy  
Section Chief,  
Record/Information  
Dissemination Section  
Records Management Division



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
		)	
Plaintiffs,		)	
		)	
v.		)	Civ. A. No. 1:13-cv-00556-RC
		)	
DEPARTMENT OF JUSTICE,		)	
		)	
Defendant.		)	
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EXHIBIT C

immediately by telephone or email and purge the original and all copies thereof. Thank you.

Kel McClanahan, Esq.  
Executive Director  
National Security Counselors

"As a general rule, the most successful man in life is the man who has the best information."  
Benjamin Disraeli, 1880

"Quis custodiet ipsos custodes?" ("Who watches the watchers?")  
Juvenal, Satire VI

----- Original Message -----

**From:** Sobonya, David P.  
**To:** Kel McClanahan, Esq.  
**Sent:** Wednesday, June 16, 2010 2:26 PM  
**Subject:** RE: FOIA req 1148707-000

Dear Mr. McClanahan,

I personally checked the Reading Room CD of the MAOP and I believe the quality reflects your version. I can have another copy made for you but I believe that the quality will be the same. I will check with the Work Process Unit to determine if an updated version can be made of the documents to improve the quality.

If you require additional assistance please contact me.

Thank you,

**David P. Sobonya**  
**Public Information Officer/Legal Admin. Specialist**  
**Service Request Unit (SRU)**  
**Record/Information Dissemination Section (RIDS)**  
**FBI-Records Management Division**  
**170 Marcel Drive, Winchester, VA 22602-4843**  
**Office: (540) 868-4286**  
**Fax: (540) 868-4995 or 4997**

---

**From:** Kel McClanahan, Esq. [mailto:kel@nationalsecuritylaw.org]  
**Sent:** Wednesday, June 16, 2010 10:42 AM  
**To:** Sobonya, David P.  
**Subject:** FOIA req 1148707-000

David,

I just received a CD in response to this FOIA request for a copy of the MAOP. However, I am surprised at the document. This appears to be a bad scan of an old document. Please confirm that this is a) the most current edition of the MAOP and b) the best copy available. With regard to this second part, I would be very surprised if there were not a digital copy (or at least a clean copy available for scanning) in existence of such a ubiquitous and important manual as the MAOP. It seems highly unlikely that a poorly scanned hardcopy document is the BEST version of this manual.

Thanks,

Kel

12/15/2010

OS-2018-000959-00941

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
		)	
Plaintiffs,		)	
		)	
v.		)	Civ. A. No. 1:13-cv-00556-RC
		)	
DEPARTMENT OF JUSTICE,		)	
		)	
Defendant.		)	
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EXHIBIT D



U.S. Department of Justice

Federal Bureau of Investigation  
Washington, D.C. 20535

June 17, 2010

MR. KEL MCCLANAHAN  
NATIONAL SECURITY COUNSELORS  
SUITE 124  
1200 SOUTH COURTHOUSE ROAD  
ARLINGTON, VA 22204

FOIPA Request No.: 1148707- 000  
Subject: MAOP

Dear Mr. McClanahan:

The records that you have requested were previously processed under the provisions of the Freedom of Information Act for another requester.

Enclosed is 1 CD pertaining to your request and a copy of the explanation of exemptions.

You may file an appeal by writing to the Director, Office of Information Policy (OIP), U.S. Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-0001. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIPA Request Number assigned to your request so that it may be identified easily.

Very truly yours,

A handwritten signature in black ink, appearing to read "D. Hardy", is written over a horizontal line.

David M. Hardy  
Section Chief,  
Record/Information  
Dissemination Section  
Records Management Division

Enclosure(s)

**EXPLANATION OF EXEMPTIONS****SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552**

- (b)(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified to such Executive order;
- (b)(2) related solely to the internal personnel rules and practices of an agency;
- (b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ( A ) could be reasonably be expected to interfere with enforcement proceedings, ( B ) would deprive a person of a right to a fair trial or an impartial adjudication, ( C ) could be reasonably expected to constitute an unwarranted invasion of personal privacy, ( D ) could reasonably be expected to disclose the identity of confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, ( E ) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or ( F ) could reasonably be expected to endanger the life or physical safety of any individual;
- (b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (b)(9) geological and geophysical information and data, including maps, concerning wells.

**SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a**

- (d)(5) information compiled in reasonable anticipation of a civil action proceeding;
- (j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;
- (k)(1) information which is currently and properly classified pursuant to an Executive order in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;
- (k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;
- (k)(4) required by statute to be maintained and used solely as statistical records;
- (k)(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service the release of which would compromise the testing or examination process;
- (k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his/her identity would be held in confidence.

FBI/DOJ

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,	)	)	
	)	)	
Plaintiffs,	)	)	
	)	)	
v.	)	)	Civ. A. No. 1:13-cv-00556-RC
	)	)	
DEPARTMENT OF JUSTICE,	)	)	
	)	)	
Defendant.	)	)	
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EXHIBIT E

**Sobonya, David P.**

**From:** Kel McClanahan, Esq. [kel@nationalsecuritylaw.org]  
**Sent:** Tuesday, June 22, 2010 6:39 PM  
**To:** Sobonya, David P.  
**Subject:** Re: FOIA req 1148707-000

Thank you, I just received a new CD with what appears to be a 2007 printout of the most-recent-at-that-time edition. If that is in fact the current edition of the MAOP (i.e. if the current edition of the MAOP was written before 1/31/07), then this is exactly what I need, except that there was no Table of Contents on the CD like there was for the previous edition. Could you just email me the TOC (rather than wasting another CD), and confirm that this January 2007 edition is the current edition?

Thanks,  
Kel

---  
This electronic mail (email) transmission is meant solely for the person(s) to whom it is addressed. It contains confidential information that may also be legally privileged. Any copying, dissemination or distribution of the contents of this email by anyone other than the addressee or his or her agent for such purposes is strictly prohibited. If you have received this email in error, please notify me immediately by telephone or email and purge the original and all copies thereof. Thank you.

Kel McClanahan, Esq.  
Executive Director  
National Security Counselors

"As a general rule, the most successful man in life is the man who has the best information."  
Benjamin Disraeli, 1880

"Quis custodiet ipsos custodes?" ("Who watches the watchers?")  
Juvenal, Satire VI

----- Original Message -----

**From:** Sobonya, David P.  
**To:** Kel McClanahan, Esq.  
**Sent:** Wednesday, June 16, 2010 2:26 PM  
**Subject:** RE: FOIA req 1148707-000

Dear Mr. McClanahan,

I personally checked the Reading Room CD of the MAOP and I believe the quality reflects your version. I can have another copy made for you but I believe that the quality will be the same. I will check with the Work Process Unit to determine if an updated version can be made of the documents to improve the quality.

If you require additional assistance please contact me.

Thank you,

**David P. Sobonya**  
**Public Information Officer/Legal Admin. Specialist**  
**Service Request Unit (SRU)**  
**Record/Information Dissemination Section (RIDS)**  
**FBI-Records Management Division**

12/15/2010

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
		)	
Plaintiffs,		)	
		)	
v.		)	Civ. A. No. 1:13-cv-00556-RC
		)	
DEPARTMENT OF JUSTICE,		)	
		)	
Defendant.		)	
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EXHIBIT F



**Sobonya, David P.**

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**From:** Kel McClanahan, Esq. [kel@nationalsecuritylaw.org]

**Sent:** Wednesday, June 23, 2010 3:23 PM

**To:** Sobonya, David P.

**Subject:** Re: FOIA req 1148707-000

I don't understand. My original request was for a complete current version of the MAOP, which your reading room says is available on CD. I didn't ask for the 1998 version, nor did I ask for the 2007 version, nor did I ask for "whatever versions have been previously released under FOIA." I asked for the current version the first time, and your reading room says that the current version is available on request. Your Work Process Unit took the shortcuts of sending me only those versions that were previously released under FOIA, but that *wasn't* what I asked for. Please send me a *full* (including TOC) *current* version of the MAOP, as your reading room says that you have available on request, and tell the Work Process Unit to stop sending me only those things that have been previously processed. This is not a new request, this is me reiterating what I asked for originally.

---  
This electronic mail (email) transmission is meant solely for the person(s) to whom it is addressed. It contains confidential information that may also be legally privileged. Any copying, dissemination or distribution of the contents of this email by anyone other than the addressee or his or her agent for such purposes is strictly prohibited. If you have received this email in error, please notify me immediately by telephone or email and purge the original and all copies thereof. Thank you.

Kel McClanahan, Esq.  
Executive Director  
National Security Counselors

"As a general rule, the most successful man in life is the man who has the best information."  
Benjamin Disraeli, 1880

"Quis custodiet ipsos custodes?" ("Who watches the watchers?")  
Juvenal, Satire VI

----- Original Message -----

**From:** Sobonya, David P.

**To:** Kel McClanahan, Esq.

**Sent:** Wednesday, June 23, 2010 3:16 PM

**Subject:** RE: FOIA req 1148707-000

Dear Mr. McClanahan,

According to the release letter on the previous FOIA request (b)(3) was used for Part II, 10-17.12.2 (Reporting Information From Other Government Agencies) and subsection (4) not (3), lists the National Security Act of 1947 and the CIA Act of 1949.

The Index for the MAOP which you have was processed under FOIA but not the Table of Contents. If you wish to submit a request for the MAOP's TABLE OF CONTENTS please let me know because I cannot simply e-mail you a copy?

I believe some revisions were made in 2008 and you can submit a new request for any updated versions if you wish?

Please let me know if you require additional assistance?

Thanks,

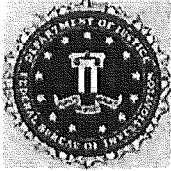
12/15/2010

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
		)	
Plaintiffs,		)	
		)	
v.		)	Civ. A. No. 1:13-cv-00556-RC
		)	
DEPARTMENT OF JUSTICE,		)	
		)	
Defendant.		)	
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EXHIBIT G

U.S. Department of Justice



Federal Bureau of Investigation

Washington, D.C. 20535

February 8, 2011

MR. KEL MCCLANAHAN  
NATIONAL SECURITY COUNSELORS  
SUITE 124  
1200 SOUTH COURTHOUSE ROAD  
ARLINGTON, VA 22204

FOIPA Request No.: 1148707- 001  
Subject: MAOP

Dear Mr. McClanahan:

This is in response to your Freedom of Information Act (FOIA) request concerning the above subject.

The material responsive to your request was reviewed under the provisions of the Freedom of Information Act, Title 5, Section 552 and is being released to you in its entirety.

If you desire, you may appeal any denials contained herein by writing the Director, Office of Information and Privacy (OIP), United States Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, D. C. 20530-001. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIPA Number assigned to your request so that it may be easily identified.

This completes the processing of your FOIA request by the FBI.

A handwritten signature in black ink, appearing to read "David Hardy", is located above the typed name.

Very truly yours,

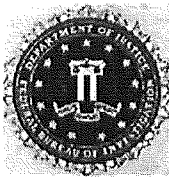
David M. Hardy  
Section Chief  
Record/Information  
Dissemination Section  
Records Management Division

Enclosure(s)

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
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Plaintiffs,		)	
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v.		)	Civ. A. No. 1:13-cv-00556-RC
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DEPARTMENT OF JUSTICE,		)	
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Defendant.		)	
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EXHIBIT H



U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535

February 18, 2011

MR. KEL MCCLANAHAN  
NATIONAL SECURITY COUNSELORS  
SUITE 124  
1200 SOUTH COURTHOUSE ROAD  
ARLINGTON, VA 22204

FOIPA Request No. 1148707- 002  
Subject: MAOP

Dear Mr. McClanahan:

This is in response to your request for a fee waiver for the above referenced Freedom of Information-Privacy Acts (FOIPA) request. Requests for fee waivers are determined on a case by case basis. See 5 U.S.C. § 552 (a)(4)(A)(iii).

In order to be granted a fee waiver or a reduction in fees, two requirements must be satisfied. First, it must be established that "disclosure of the [requested] information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." Second, it must be established that "disclosure of the information . . . is not primarily in the commercial interest of the requester." See 5 U.S.C. § 552(a)(4)(A)(iii). The burden is on the requester to show the statutory requirements for a fee waiver have been met. Where one or both of these requirements has not been satisfied, a fee waiver is not warranted under the statute.

To determine whether the first requirement has been met, we consider the following four factors: (1) whether the subject of the requested records concerns "the operations or activities of the government;" (2) whether the disclosure is "likely to contribute" to an understanding of government operations or activities; (3) whether disclosure of the requested information will contribute to "public understanding;" and (4) whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. See 28 C.F.R. § 16.11(k)(2).

If the first requirement has been met, we are then required to determine whether disclosure of the requested information is primarily in the commercial interest of the requester. To make this determination, we consider the following two factors: (1) whether the requester has a commercial interest that would be furthered by the requested disclosure and (2) whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester." See 28 C.F.R. § 16.11(k)(3). If the requester's commercial interest in disclosure is greater than the public interest to be served, then a fee waiver is not warranted.

We have reviewed the information that you provided in support of your request for a fee waiver and have found that you do not satisfy either requirement. Simply making a request for a fee waiver without also providing factual details or support specific to your request, is not sufficient under the law. Consequently, your request is denied.

You may appeal this denial by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, D.C., 20530-0001. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal." Please cite the FOIPA number assigned to your request to facilitate its identification.

Sincerely yours,

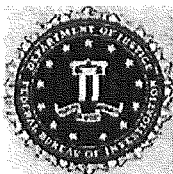
A handwritten signature in black ink, appearing to read "David Hardy", is located below the "Sincerely yours," text.

David M. Hardy

Section Chief,  
Record/Information  
Dissemination Section  
Records Management Division

OS-2018-000959-00952

U.S. Department of Justice



Federal Bureau of Investigation

Washington, D.C. 20535

February 18, 2011

MR. KEL MCCLANAHAN  
NATIONAL SECURITY COUNSELORS  
SUITE 124  
1200 SOUTH COURTHOUSE ROAD  
ARLINGTON, VA 22204

FOIPA Request No.: 1148707- 002  
Subject: MAOP

Dear Mr. McClanahan:

- ☒ This acknowledges receipt of your Freedom of Information-Privacy Acts (FOIPA) request to the FBI. The FOIPA number listed above has been assigned to your request.
- ☐ For an accurate search of our records, please provide the complete name, alias, date and place of birth for the subject of your request. Any other specific data you could provide such as prior addresses, or employment information would also be helpful. If your subject is deceased, please include date and proof of death.
- ☐ To make sure information about you is not released to someone else, we require your notarized signature or, in place of a notarized signature, a declaration pursuant 28 U.S.C. § 1746. For your convenience, the reverse side of this letter contains a form which may be used for this purpose.
- ☐ If you want the FBI's Criminal Justice Information System (CJIS) to perform a search for your arrest record, please follow the enclosed instructions in Attorney General Order 556-73. You must submit fingerprint impressions so a comparison can be made with the records kept by CJIS. This is to make sure your information is not released to an unauthorized person.
- ☒ We are searching the indices to our Central Records System for the information you requested, and will inform you of the results as soon as possible.
- ☐ Processing delays have been caused by the large number of requests received by the FBI. We will process your request(s) as soon as possible.

Your request has been assigned the number indicated above. Please use this number in all correspondence with us. Your patience is appreciated.

A handwritten signature in black ink, appearing to be "D. A. B.", is located above the closing text.

Very truly yours,

Dissemination Section

David M. Hardy  
Section Chief,  
Record/Information  
Records Management Division

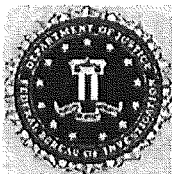
IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
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Plaintiffs,		)	
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v.		)	Civ. A. No. 1:13-cv-00556-RC
		)	
DEPARTMENT OF JUSTICE,		)	
		)	
Defendant.		)	
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EXHIBIT I



U.S. Department of Justice



Federal Bureau of Investigation

Washington, D.C. 20535  
February 24, 2011

MR. KEL MCCLANAHAN  
NATIONAL SECURITY COUNSELORS  
SUITE 124  
1200 SOUTH COURTHOUSE ROAD  
ARLINGTON, VA 22204

FOIPA Request No.: 1148707- 002  
Subject: MAOP

Dear Mr. McClanahan:

This is in reference to your Freedom of Information-Privacy Acts (FOIPA) request.

We have located approximately 2038 pages which are potentially responsive to your request. Releases are available on CD upon request. Each CD contains approximately 500 pages per release. The 500 page estimate is based on our business practice of processing medium and large track cases through interim releases that generally equal approximately 500 pages. The first 100 pages of duplication, or the cost equivalent (\$10.00) for releases on CD, will be provided to you at no charge. In accordance with the DOJ regulations, the FBI notifies requesters when anticipated fees exceed \$25.00. If all of the pages that are potentially responsive to your request are released, you will owe \$65.00 (5 CD's at \$15.00 less \$10.00) to receive the release on a CD. Please remember this is only an estimate, and if some of the pages are withheld in full pursuant to FOIA/Privacy Act exemption(s) or are determined to not be responsive to your request, the actual charges could be less.

To accelerate the processing of your request, you may wish to consider reducing the scope of your request so that it will fall within one of the smaller queues. This may allow you to lower your search and duplication costs and hasten the receipt of your information. The FBI uses a three-queue system as a way to fairly assign and process new requests. The placement of a request in one of the three queues depends on the total number of pages responsive to that request - 500 pages or less (small queue), 501 pages to 2500 pages (medium queue), or more than 2500 pages (large queue). The small queue has the fastest rate of processing. Please let us know in writing if you are interested in discussing the possibility of reducing the scope of your request, as well as your willingness to pay the estimated search and duplication costs indicated in the above paragraph. Your written response should provide a telephone number where you can be reached between the hours of 8:00 a.m. and 5:00 p.m., EST, if one is available. Please send this response to: Work Process Unit, Record Information/Dissemination Section, Records Management Division, Federal Bureau of Investigation, 170 Marcel Drive, Winchester, VA 22602. You may also fax your response to the following number: 540-868-4997, Attention: Work Process Unit.

**No payment is required at this time.** However, you must notify us in writing within thirty (30) days from the date of this letter of your commitment to pay the estimated fee. If we do not receive your commitment to pay within thirty (30) days of the date of this notification, your request will be closed. Please include the FOIPA Request Number listed above in any communication regarding this matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "D. Hardy", is located below the "Sincerely yours," text.

David M. Hardy  
Section Chief,  
Record/Information  
Dissemination Section  
Records Management Division

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

<hr/>		)	
NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
		)	
Plaintiffs,		)	
		)	
v.		)	Civ. A. No. 1:13-cv-00556-RC
		)	
DEPARTMENT OF JUSTICE,		)	
		)	
Defendant.		)	
<hr/>		)	

EXHIBIT J

## NATIONAL SECURITY COUNSELORS

1200 SOUTH COURTHOUSE ROAD  
SUITE 124  
ARLINGTON, VA 22204

TELEPHONE: (301) 728-5908  
FACSIMILE: (240) 681-2189

KEL MCCLANAHAN, ESQ., EXECUTIVE DIRECTOR (admitted in NY, DC)  
EMAIL: KEL@NATIONALSECURITYLAW.ORG

BRADLEY P. MOSS, ESQ., DEPUTY EXECUTIVE DIRECTOR (admitted in IL, DC)  
EMAIL: BRAD@NATIONALSECURITYLAW.ORG

RECEIVED

5 October 2011

OCT 05 2011

Office of Information Policy

Melanie Ann Pustay  
Director  
Office of Information Policy  
U.S. Department of Justice  
1425 New York Avenue, NW  
Suite 11050  
Washington, DC 20530-0001

Re: FBI FOIA Request #1148707-002

Dear Ms. Pustay:

I have received David Hardy's letters dated 18 February and 24 February 2011 regarding the above indicated FOIA request for a copy of the **current Manual of Administrative Operations and Procedures ("MAOP")**. In these letters, Mr. Hardy denied our request for a public interest fee waiver and stated that the FBI would only release the record on five CDs, charging us a total of \$65. I am writing to appeal both of these decisions.

As an initial matter, this appeal is tardy because I have been waiting on a response from Janice McLeod to a set of inquiries about the latter practice sent on 4 May 2011, and I have not yet received an answer. On 24 March 2011, because this appeal related directly to a then-pending appeal (AP-2011-00113), Ms. McLeod initially gave me an extension of the appeal deadline until an appeal decision was made in that appeal. After she made a determination in AP-2011-00113 on 22 April 2011, I requested clarification from Ms. McLeod about some of the points in her response letter on 4 May 2011, and asked for a further extension of this appeal deadline until she had answered the questions. Ms. McLeod did not formally give me such permission, but after she asked me for more details about the initial extension, which I provided, she thanked me and did not deny the request. From this exchange and our past interactions, I assumed that she consented to this extension. However, as five months have now passed without a response to my inquiries, I feel it is time to submit my appeal and get the review process started.

As a bit of background for this request, this is now the third iteration of a straightforward request made in May 2010 for a current copy of the MAOP. In May 2010, the FBI's Electronic Reading Room included a link for the MAOP but stated "for a copy, file a FOIA request." We

accordingly did so on 19 May 2010, requesting an electronic copy of the current MAOP and a fee waiver, since the record was supposed to be available in the FBI reading room. The FBI assigned this Request No. 1148707-000 on 27 May 2010, denied our fee waiver request, and informed us that a CD would cost \$15. I appealed the decision to the Public Liaison, Dennis Argall, on 3 June 2010, and on 11 June 2010 we received a CD with a poor-quality scan of the 1998 edition of the MAOP. not

On 16 June 2010, I emailed Dave Sobonya, the official FBI point of contact, asking if the 1998 edition was the current edition, reminding him that we had requested the current edition. On 17 June 2010, we received another CD, this time with the 2007 edition, but with no table of contents. On 22 June 2010, I emailed Dave Sobonya again, asking if the 2007 edition was the current edition, and asking for the table of contents, reminding him again that we had requested the complete current edition. On 23 June 2010, Dave Sobonya replied, stating that there had been modifications since the 2007 edition, but that we would have to file a new FOIA request for the current edition and the table of contents. I replied, stating that our initial request had been for those documents, and the FBI had sent us previous editions of their own volition.

On 27 July 2010, Dennis Argall emailed me, stating that the FBI would process the request for the current edition, including the table of contents and all supplements. On 8 February 2011, we received a paper copy of the table of contents of the current MAOP and a letter stating that the request (now #1148707-001) was being closed. On 11 February and 15 February 2011, I emailed Dennis Argall, reminding him that the request couldn't be closed until the current edition was processed (not just the table of contents), and that we had requested electronic records.

On 18 February 2011, I received a letter informing me that the FBI had opened yet *another* request for the current edition in its entirety, this time assigning it Request No. 1148707-002. This letter (the subject of the current appeal) once again denied our request for a fee waiver, and on 24 February 2011, the FBI informed us in another letter (also the subject of the current appeal) that because the MAOP is 2038 pages long, the FBI would only release it in approximately 500-page chunks across five CDs, charging us \$65 (\$75 minus \$10, which would be the duplication cost of 100 pages). That day, I emailed Dennis Argall, asking him to fix the fee waiver issue (which would moot the CD issue), in light of the fact that we were given a fee waiver the first time around and all the subsequent releases had been bureaucratic errors. On 25 February 2011, Dennis Argall responded, stating rather strangely that we had never been given a fee waiver.

### ***Public Interest Fee Waiver***

Our reasons for asking for a public interest fee waiver are the same now as they were in May 2010. The MAOP meets the requirements of both subsections (a)(2)(B) and (D) of FOIA requiring that it be made publicly available. The mere fact that the FBI made a mention of it in its 2010 reading room and includes the 2007 edition (minus the table of contents) in its current reading room is itself evidence that the FBI believes that this record is of public interest. The FBI's assertion that it can somehow satisfy its proactive disclosure requirement by publishing an old edition is legally unsound, and its corollary assertion that the public interest would not be

served by NSC publishing the current edition *for it* is nonsensical. That the FBI saw fit to release responsive records no less than three times in response to this request without charging NSC before irrationally refusing to provide a final response (which was the response requested the entire time) without payment only serves to highlight the unreasonableness of the FBI's position.

***500 Pages Per CD***

According to the FBI, this practice is the result of its desire to provide interim releases to requesters, but in a situation such as this one it results in an absurd result. The document which the FBI claims *must* be split between five separate CDs is *one single document*. No reasonable person would expect interim releases of parts of *one record*. We have repeatedly informed the FBI that we waive our right to interim responses, thereby allowing the FBI to make one release on one CD when it has completed its review, but the FBI still insists that it cannot release more than approximately 500 pages on a single CD. This practice is a textbook example of the type of "unnecessary bureaucratic hurdles" that Attorney General Holder proclaimed have no place in the current era of open government. As such, even if our fee waiver request is denied, the FBI should be made to follow our clear directions and release the entire current MAOP on one CD, which according to FBI guidelines is to be provided free of charge.<sup>1</sup>

Your cooperation in this matter would be appreciated. If you wish to discuss this appeal, please do not hesitate to contact me.

Sincerely,



Kel McClanahan —  
Executive Director

---

<sup>1</sup> This release should be considered to be the "first CD" released to NSC, since all previous releases were non-responsive to our request and were the sole result of the FBI's bureaucratic mistakes.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

<hr/>		)	
NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,	)	)	
	)	)	
Plaintiffs,	)	)	
	)	)	
v.	)	)	Civ. A. No. 1:13-cv-00556-RC
	)	)	
DEPARTMENT OF JUSTICE,	)	)	
	)	)	
Defendant.	)	)	
<hr/>		)	

EXHIBIT K



U.S. Department of Justice

Office of Information Policy

Telephone: (202) 514-3642

Washington, D.C. 20530

DEC 09 2011

Kel McClanahan, Esq.  
National Security Counselors  
Suite 124  
1200 South Courthouse Road  
Arlington, VA 22204

Re: Request No. 1148707-002

Dear Mr. McClanahan:

This is to advise you that your administrative appeal from the action of the Federal Bureau of Investigation was received by this Office on October 5, 2011.

The Office of Information Policy has the responsibility of adjudicating such appeals. In an attempt to afford each appellant equal and impartial treatment, we have adopted a general practice of assigning appeals in the approximate order of receipt. Your appeal has been assigned number **AP-2012-00784**. Please mention this number in any future correspondence to this Office regarding this matter.

We will notify you of the decision on your appeal as soon as we can. If you have any questions about the status of your appeal you may contact me at the number above.

Sincerely,

A handwritten signature in black ink, appearing to read "Priscilla Jones", is written over a horizontal line.

Priscilla Jones  
Supervisory Administrative Specialist

FILE

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
		)	
Plaintiffs,		)	
		)	
v.		)	Civ. A. No. 1:13-cv-00556-RC
		)	
DEPARTMENT OF JUSTICE,		)	
		)	
Defendant.		)	
<hr/>		)	

EXHIBIT L





U.S. Department of Justice  
Office of Information Policy  
Suite 11050  
1425 New York Avenue, NW  
Washington, DC 20530-0001

Telephone: (202) 514-3642

MAY 23 2012

Kel McClanahan, Esq.  
National Security Counselors  
Suite 124  
1200 South Courthouse Road  
Arlington, VA 22204

Re: Appeal No. AP-2012-00784  
Request No. 1148707-002  
JGM:MWH

Dear Mr. McClanahan:

You appealed from the action of the Federal Bureau of Investigation on your request for access to the current Manual of Administrative Operations and Procedures (MAOP). Specifically, you appealed the FBI's denial of your public interest fee waiver request as well as the FBI's estimate of reproduction fees.

As you know, by e-mail dated March 23, 2011, you asked me for an extension of time to appeal the above-referenced FBI FOI/PA request until I had issued a decision on your appeal AP-2011-00113; I indicated "yes, in this instance" but encouraged you to instead submit an appeal by simply stating in writing "I appeal" thus acquiring a place in line and eliminating any untimely issue. You chose not to appeal at that time. Within less than an hour of my "yes," you forwarded three "what if" scenarios with reference to the appeal extension.

OIP's decision on appeal AP-2011-00113 was rendered on April 22, 2011. As you know, that appeal decision, a partial grant, made determinations on several miscellaneous fee issues you had raised. Your next communication to me appears to have been on May 4, 2011<sup>1</sup> and was not, unfortunately, your belated appeal of the FBI matter, but rather three enumerated paragraphs in which you posed questions, hypotheticals, and comments about the April 22, 2011 appeal decision that had been rendered twelve days earlier. It also included a request for a second appeal extension. You requested that you now be allowed to submit your appeal "7 days from whatever day" OIP answered the question(s) posed in your May 4, 2011 email. On June 22, 2011, not having received a response from me, you sent another email asking again for a second extension of seven days referencing the matter as concerning a "current appeal."<sup>2</sup>

<sup>1</sup> Please advise if I have passed over any emails or other communications from you that are of import.

<sup>2</sup> As you may recall, I was out-of-office in excess of three weeks in May-June 2011 due to a family matter.

FILE COPY

- 2 -

Thereafter, I asked that you identify the "current appeal" of which you spoke in your June 22, 2011 email.<sup>3</sup> While I truly appreciate the patience you have shown in getting certain questions answered, the matter about which you wrote in your May 4, 2011 email did not concern a "current appeal" but rather a closed appeal that had been adjudicated on April 22, 2011. It has long been the practice of OIP that when a query is raised about an appeal post-adjudication, it is considered to be a request for reconsideration of that appeal decision, a post-appeal, non-statutory, non-regulatory practice that does not have a timetable for completion.

Having now reviewed the appeal that is the subject of this letter I find your argument that it is related to the various fee issues presented in Appeal No. AP-2011-00113, unpersuasive. Having said that, however, I will stand by my statement that I would grant you an extension for this current appeal and untimeliness is not being raised in this instance.

As you know, the statutory standard for evaluating fee waiver requests provides that fees shall be waived or reduced "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). In determining whether you have satisfied this statutory standard, I considered the six factors set out in the Department of Justice regulation that puts this statutory standard into effect. See 28 C.F.R. § 16.11(k) (2011). The first four of these factors concern the "public interest" requirement; the fifth and six factors concern whether your interest in the records is primarily commercial.

On the basis of all of the information available to me, I am affirming the FBI's denial of your request for a waiver of fees. Although the records you seek concern the operations or activities of the government, and you do not appear to have an overriding commercial interest commercial interest in the records, you have not satisfied other necessary factors, in particular factors two and four.

In order to qualify for a fee waiver you must demonstrate that you meet the release of the information to you is in the public interest because "it is likely to contribute significantly" to the public's understanding of the FBI's operations or activities. Importantly, the document you have asked for is publicly available on the FBI's web site. Requests for information that is already in the public domain generally do not warrant a fee waiver because the disclosure would not be likely to meet factor two where nothing new or substantive would be added to the public's understanding. You have provided nothing that would support altering the general standard in this instance. See e.g., Judicial Watch, Inc. v. DOJ, 365 F.3d 1108, 1127 (D.C. Cir. 2004) (upholding denial of blanket fee waiver, noting that plaintiff had failed to rebut government representation that information was in public domain). Courts in at least the 2nd, 9th, and 11th federal judicial circuits have reached the same conclusion: See, e.g., Sierra Club Def. Fund v. Bibles, No. 93-35383, slip op. at 4, 1994 U.S. App. LEXIS 23588, \*4 (9th Cir. Aug. 29, 1994) (noting plaintiff failed to explain "how its work would add anything to 'public understanding'"

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<sup>3</sup> The June 22, 2011 email from me asked you to identify the "current appeal" of which you spoke and the date of a particular email exchange.

- 3 -

where requested material already disseminated and publicized); Carney v. DOJ, 19 F.3d 807, 815 (2d Cir. 1994); see also Sloman v. DOJ, 832 F. Supp.63, 68 (S.D.N.Y. 1993) (stating that public's understanding would not be enhanced to significant extent where material was previously released to other writers and more important[ly]"was available in agency's public reading room").

Your initial presentation to the FBI consisted of a single sentence in support of your fee waiver request, stating that you "[w]ill make the MAOP publicly available on our website for free download." On appeal you further suggested that subsections 5 U.S.C. § 552(a)(2)(B) and (D) require that this document "be made publicly available" seemingly as additional grounds in support of your fee waiver request. The former subsection cited refers to "statements of policy or interpretations which have been adopted by the agency while the latter refers to frequently requested records. Regardless of which provision of the FOIA is relied on, the fact remains that the FBI does make this document publicly available in its electronic reading room, including a thirteen-page topical index, and that you propose to do no more than what the FBI already does.<sup>4</sup>

Lastly, I considered the FBI's assessment of duplication fees in the amount of \$65, and its request for your commitment to pay this estimated fee before production of any of the requested records. As you know, Department regulations allow a component to require that a requester commit to pay fees in excess of \$25 before it is obligated to release any responsive records. See 28 C.F.R. § 16.11(e).

By letter dated February 24, 2011, the FBI informed you that it had 2038 pages of records potentially responsive to your request. In response to that specific production request the FBI informed you that it would take approximately five CD-ROMs to complete the production and that you would be charged \$15 for each CD-ROM produced. As you are aware, Department regulations, based on the guidance provided by the Office of Management and Budget,<sup>5</sup> provide for the assessment of "direct costs" when a medium other than paper is used. "For copies produced by computer . . . components will charge the direct costs, including operator time, of producing that copy. For other forms of duplication, components will charge the direct costs of that duplication." 28 C.F.R. § 16.11(c)(2); see also 28 C.F.R. § 16.11(b)(2). Nonetheless, the FBI has not passed all of the "direct costs" of preparing a CD-ROM for release on to the requester. It is my understanding that none of the costs associated with scanning responsive documents into a pdf. file prior to loading records onto a CD-ROM have been passed on to any requester. Additionally, because all FBI FOIA requests are processed on its classified computer network, when a CD-ROM is prepared for release, it must undergo a more stringent process than simply saving the information to a CD-ROM. The CD-ROM must be run through an additional software application before it can be released and the cost of running this application (which takes approximately one hour for a 500-page release) exceeds the \$15 fee assessed by the FBI

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<sup>4</sup> I note in your appeal your make much of the fact that your request was for a "current" copy of the MAOP and in your appeal you mentioned your request for "the complete current edition." Unless you provided the FBI with a different version of your request, I note that the copy of your request in OIP's appeal file states that your request is for "[a]n electronic copy of the MAOP."

<sup>5</sup> OMB Fee Guidelines can be found at 52 Fed. Reg. 10012 (Mar. 27, 1987).

- 4 -

per CD-ROM. Accordingly, I find that the \$15 fee charged by the FBI per CD-ROM is reasonable.

Additionally, please be assured that there is no financial incentive for the FBI to use more than one CD-ROM. As I am sure you know, all FOIA fees collected are ultimately deposited into the United States Treasury and not into individual agency accounts. See Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10012 (Mar. 27, 1987) ("funds agencies receive for providing FOIA services are to be deposited in the general revenues of the United States rather than individual agency accounts").

The FBI determined its estimated duplication fee by multiplying the \$15 fee charged by the FBI per CD-ROM by five (the total estimated number of CD-ROMs required to produce the responsive records), less \$10 (the cost equivalent for the first one hundred pages to which you are entitled by statute), for a total of \$65.<sup>6</sup> In consideration of all of the facts above, I find this estimate to be reasonable. Accordingly, I am denying your appeal of the FBI's fee estimate and its request for a commitment to pay fee before producing any responsive records. If you wish instead to have only your statutory entitlement to the first one hundred pages of the MAOP please advise this Office.

As to your complaint about the number of pages put on a single CD, I enclose a copy of the April 22, 2011 letter to you which explains in detail the reason behind this practice at 2, first full paragraph, which I incorporate by reference.

Please be advised that this Office's decision was made only after a full review of this matter. Your appeal was assigned to an attorney with this Office who thoroughly reviewed and analyzed your appeal, your underlying request, and the actions of the FBI in response to your request.

If you are dissatisfied with my action on your appeal, the FOIA permits you to file a lawsuit in federal district court in accordance with 5 U.S.C. § 552(a)(4)(B).

Sincerely,



Janice Galli McLeod  
Associate Director

Enclosure

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<sup>6</sup> While the fees will be no higher than \$65.00 it is likely that the total fees owed will be \$50.00.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
		)	
Plaintiffs,		)	
		)	
v.		)	Civ. A. No. 1:13-cv-00556-RC
		)	
DEPARTMENT OF JUSTICE,		)	
		)	
Defendant.		)	
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EXHIBIT M

U.S. Department of Justice



**Federal Bureau of Investigation**  
 Washington, D.C. 20535

July 25, 2013

Kel McClanahan, Esq.  
 National Security Counselors  
 Suite 124  
 1200 South Courthouse Road  
 Arlington, VA 22204

FOIPA Request No.: 1148707-005  
 Subject: MAOP

Dear Mr. McClanahan:

The enclosed documents were reviewed under the Freedom of Information Act (FOIA), Title 5, United States Code, Section 552. Deletions have been made to protect information which is exempt from disclosure, with the appropriate exemptions noted on the page next to the excision. In addition, a deleted page information sheet was inserted in the file to indicate where pages were withheld entirely. The exemptions used to withhold information are marked below and explained on the enclosed Explanation of Exemptions:

<b>Section 552</b>		<b>Section 552a</b>
<input type="checkbox"/> (b)(1)	<input type="checkbox"/> (b)(7)(A)	<input type="checkbox"/> (d)(5)
<input checked="" type="checkbox"/> (b)(2)	<input type="checkbox"/> (b)(7)(B)	<input type="checkbox"/> (j)(2)
<input type="checkbox"/> (b)(3)	<input type="checkbox"/> (b)(7)(C)	<input type="checkbox"/> (k)(1)
_____	<input type="checkbox"/> (b)(7)(D)	<input type="checkbox"/> (k)(2)
_____	<input checked="" type="checkbox"/> (b)(7)(E)	<input type="checkbox"/> (k)(3)
_____	<input type="checkbox"/> (b)(7)(F)	<input type="checkbox"/> (k)(4)
<input type="checkbox"/> (b)(4)	<input type="checkbox"/> (b)(8)	<input type="checkbox"/> (k)(5)
<input type="checkbox"/> (b)(5)	<input type="checkbox"/> (b)(9)	<input type="checkbox"/> (k)(6)
<input type="checkbox"/> (b)(6)		<input type="checkbox"/> (k)(7)

495 pages were reviewed and 495 pages are being released.

☐ Document(s) were located which originated with, or contained information concerning other Government agency(ies) [OGA]. This information has been:

☐ referred to the OGA for review and direct response to you.

☐ referred to the OGA for consultation. The FBI will correspond with you regarding this information when the consultation is finished.

☐ In accordance with standard FBI practice and pursuant to FOIA exemption (b)(7)(E) and Privacy Act exemption (j)(2) [5 U.S.C. § 552/552a (b)(7)(E)/(j)(2)], this response neither confirms nor denies the existence of your subject's name on any watch lists.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

☒ You have the right to appeal any denials in this release. Appeals should be directed in writing to the Director, Office of Information Policy (OIP), U.S. Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-0001, or you may submit an appeal through OIP's eFOIA portal at <http://www.justice.gov/oip/efoia-portal.html>. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIPA Request Number assigned to your request so that it may be easily identified.

☐ The enclosed material is from the main investigative file(s) in which the subject(s) of your request was the focus of the investigation. Our search located additional references, in files relating to other individuals, or matters, which may or may not be about your subject(s). Our experience has shown when ident, references usually contain information similar to the information processed in the main file(s). Because of our significant backlog, we have given priority to processing only the main investigative file(s). If you want the references, you must submit a separate request for them in writing, and they will be reviewed at a later date, as time and resources permit.

☒ See additional information which follows.

Sincerely,



David M. Hardy  
Section Chief  
Record/Information  
Dissemination Section  
Records Management Division

Enclosures (2)

Enclosed is a processed copy of the FBI MAOP as it existed on July 2, 2013. Since March 2008, the FBI has been reviewing and replacing the MAOP with Corporate Policy Office Directives and Policy Implementation Guides. As new policy documents are approved, the appropriate sections of the MAOP are updated on the FBI's intranet, where the MAOP is maintained.

The FBI is making this release to you, at no charge, in an effort to narrow the issues in dispute in NSC et al. v. DOJ, Civ. No. 13-cv-556 (D.D.C.). It is a discretionary release and is being made subject to, and without waiver of, the FBI's defenses (including, but not limited to, all defenses set forth at the administrative level) with respect to the claims at issue in the above-referenced lawsuit.

Please note that a Table of Contents is no longer being maintained for the MAOP, but we have included a PDF version of the library index listing all of the sections existing in the MAOP as of July 2, 2013. Lastly, there is currently no Section 7 in Part 2 of the MAOP.

**EXPLANATION OF EXEMPTIONS****SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552**

- (b)(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified to such Executive order;
- (b)(2) related solely to the internal personnel rules and practices of an agency;
- (b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ( A ) could reasonably be expected to interfere with enforcement proceedings, ( B ) would deprive a person of a right to a fair trial or an impartial adjudication, ( C ) could reasonably be expected to constitute an unwarranted invasion of personal privacy, ( D ) could reasonably be expected to disclose the identity of confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, ( E ) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or ( F ) could reasonably be expected to endanger the life or physical safety of any individual;
- (b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (b)(9) geological and geophysical information and data, including maps, concerning wells.

**SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a**

- (d)(5) information compiled in reasonable anticipation of a civil action proceeding;
- (j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;
- (k)(1) information which is currently and properly classified pursuant to an Executive order in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;
- (k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;
- (k)(4) required by statute to be maintained and used solely as statistical records;
- (k)(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service the release of which would compromise the testing or examination process;
- (k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his/her identity would be held in confidence.

FBI/DOJ



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

<hr/>		)	
NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
		)	
Plaintiffs,		)	
		)	
v.		)	Civ. A. No. 1:13-cv-00556-RC
		)	
DEPARTMENT OF JUSTICE,		)	
		)	
Defendant.		)	
<hr/>		)	

EXHIBIT N

## NATIONAL SECURITY COUNSELORS

1200 SOUTH COURTHOUSE ROAD  
SUITE 124  
ARLINGTON, VA 22204

TELEPHONE: (301) 728-5908  
FACSIMILE: (240) 681-2189

KEL MCCLANAHAN, ESQ., EXECUTIVE DIRECTOR (admitted in NY, DC)  
EMAIL: KEL@NATIONALSECURITYLAW.ORG

BRADLEY P. MOSS, ESQ., DEPUTY EXECUTIVE DIRECTOR (admitted in IL, DC)  
EMAIL: BRAD@NATIONALSECURITYLAW.ORG

13 September 2011

David M. Hardy, Chief  
Record/Information Dissemination Section  
Records Management Division  
Federal Bureau of Investigation  
170 Marcel Drive  
Winchester, VA 22602-4843

Re: FOIA Request – RMD website

Dear Mr. Hardy:

This is a request on behalf of my client Jeff Stein under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.*, for a copy of **all pages on the internal Federal Bureau of Investigation ("FBI") Records Management Division ("RMD") website <http://rmd.fbinet.fbi>**, as well as all documents, images, audio and video files, and any other files posted on the RMD website. The date this information is obtained from the website is not important, so the FBI FOIA analyst processing this request should feel free to simply obtain the responsive records on the day he/she begins the search. You may exclude any records currently available on a public U.S. government website to which the RMD website simply provides links. You may also exclude the 100 pages provided to National Security Counselors in response to FOIA Request No. 1159046-000, as we have already made this information publicly available on our website. Mr. Stein is to be considered the only requester for your administrative purposes; National Security Counselors is *not* to be considered a requester. I have attached a signed authorization form to this effect.

When processing this request, please note that the DC Circuit has previously held that agencies have a duty to construe the subject material of FOIA requests *liberally* to ensure responsive records are not overlooked. See *Nation Magazine, Washington Bureau v. U.S. Customs Service*, 71 F.3d 885, 890 (D.C. Cir. 1995). Accordingly, you are hereby instructed that the term "record" includes, *but is not limited to*: 1) all email communications to or from any individual within your agency; 2) memoranda; 3) inter-agency communications; 4) sound recordings; 5) tape recordings; 6) video or film recordings; 7) photographs; 8) notes; 9) notebooks; 10) indices; 11) jottings; 12) message slips; 13) letters or correspondence; 14) telexes; 15) telegrams; 16) facsimile transmissions; 17) statements; 18) policies; 19) manuals or binders; 20) books; 21) handbooks; 22) business records; 23) personnel records; 24) ledgers; 25)

notices; 26) warnings; 27) affidavits; 28) declarations under penalty of perjury; 29) unsworn statements; 30) reports; 31) diaries; or 32) calendars; regardless of whether they are handwritten, printed, typed, mechanically or electronically recorded or reproduced on any medium capable of conveying an image, such as paper, CDs, DVDs, or diskettes. Furthermore, in line with the guidance issued by the Department of Justice ("DOJ") on 9 September 2008 to all federal agencies with records subject to FOIA, agency records that are currently in the possession of a U.S. Government contractor for purposes of records management remain subject to FOIA. Similarly, all documents should be reviewed in their entirety, and no information be omitted on the grounds of "non-relevance." Finally, please consider this letter an affirmative rejection of any limitation of your search to records created prior to the date of this request. To the contrary, Mr. Stein stipulates that this search should be restricted to records created prior to the date of the first substantive review of this request by FBI FOIA personnel (as opposed to the date that receipt of the request was acknowledged by the FBI).

In conclusion, the FBI is hereby instructed to interpret the scope of this request in the most liberal manner possible short of an interpretation that would lead to a conclusion that the request does not reasonably describe the records sought. If, even given these restrictions, the FBI still determines that this request does not reasonably describe the records sought, it is instructed to contact me pursuant to 28 C.F.R. § 16.3 to discuss reformulation of the request before rejecting the request as overbroad, vague, or unduly burdensome.

If you deny all or part of this request, please cite the specific exemptions you believe justify your refusal to release the information or permit the review and notify us of your appeal procedures available under the law. In excising material, please "black out" rather than "white out" or "cut out." In addition, I draw your attention to President Obama's 21 January 2009 *Memorandum for the Heads of Executive Departments and Agencies*, directing federal agencies to adopt a presumption in favor of disclosure and stating that government information should not be kept confidential "merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears." To permit Mr. Stein to reach an intelligent and informed decision whether or not to file an administrative appeal of any denied material, please describe any withheld records (or portions thereof) and explain the basis for your exemption claims. This description should include a list of the withheld documents, pursuant to *Shermco Indus. v. Sec'y of the U.S. Air Force*, 452 F. Supp. 306, 317 n.7 (N.D. Tx. 1978) ("A person cannot effectively appeal a decision about the releasability of documents . . . if he is not informed of at least a list of the documents to which he was denied access . . . and why those decisions were made. Denial of this information would in all likelihood be a violation of due process as well as effectively gutting the reasons for applying the exhaustion doctrine in FOIA cases.").

Mr. Stein qualifies as a representative of the news media. He is an investigative reporter of long standing, specializing in U.S. intelligence, defense, and foreign policy. An Army Intelligence case officer in Vietnam, he also launched CQ's Homeland Security daily in 2002 and served as national security editor. A frequent contributor to national magazines and Op-ed pages over the years, Jeff was deputy foreign editor for UPI during the 1980s. He has appeared on virtually every U.S. and foreign television and radio network as a commentator on national security issues. His SpyTalk blog is one of the most recognized national security news blogs in

existence. According to 5 U.S.C. § 552(a)(4)(A)(ii), codifying the ruling of *Nat'l Security Archive v. Dep't of Defense*, 880 F.2d 1381 (D.C. Cir. 1989),

the term "a representative of the news media" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

Mr. Stein has clear intent to "publish[ ] or otherwise disseminate[ ] information to the public." *Id.* at 1386 (quoting the following legislative history: 1) "It is critical that the phrase 'representative of the news media' be broadly interpreted if the act is to work as expected. . . . In fact, any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a 'representative of the news media.'" 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986) (emphasis in original quotation); 2) "A request by a reporter or other person affiliated with a newspaper, magazine, television or radio station, or other entity that is in the business of publishing or otherwise disseminating information to the public qualifies under this provision." 132 Cong. Rec. H9463 (Oct. 8, 1986) (emphasis in original quotation)). Therefore, in accordance with the Freedom of Information Act and relevant case law, Mr. Stein should be considered a representative of the news media.

Mr. Stein is also requesting a public interest fee waiver. There can be no question that the information sought would contribute to the public's understanding of government operations or activities and is in the public interest. Despite the government-wide increase in transparency over the last few years, very little is still known about the way in which the FBI organizes its files and manages its records. This website featured prominently in the Records Management Overview training video recently obtained by the Black Vault (<http://publicscreening.theblackvault.com/publicscreening/FBIRecordsManagement.html>) and was touted in the video as the source of all the information FBI employees would need regarding FBI records management. These records will shed much-needed light on the FBI's records management system, which in turn will contribute to the public's understanding of government operations or activities.

I also specifically state for the record Mr. Stein's unwillingness to pay any fees for this request. Please do not delay the processing of this request by needlessly requesting further confirmation of this unwillingness to pay fees or terminate the processing of this request for failure to provide you with such confirmation. This statement is a full and unequivocal refusal to pay any fees for this request.

Please ensure that, in accordance with the DC Circuit's ruling in *Chambers v. Dep't of the Interior*, 568 F.3d 998 (D.C. Cir. 2009), all records potentially responsive to this FOIA request are immediately preserved from destruction until the final resolution of this FOIA action. Destruction of potentially responsive records after the receipt of a FOIA request is considered "contumacious conduct" by the DC Circuit. *See id.* at 1004.

The FBI is required by law to respond to this request within 20 working days. Failure to timely comply may result in the filing of a civil action against your agency in a United States District Court.

Please provide any records produced in response to this request in the *original* electronic (soft-copy) forms in which they are posted on the RMD website (e.g., word processing documents should remain word processing documents, spreadsheets should remain spreadsheets, image files should remain image files, etc.). The only exception to this rule is that actual webpages may be converted to Adobe Acrobat files. Please provide soft-copy records by email or on a CD if email is not feasible. If a CD is necessary, Mr. Stein specifically absolves the FBI of its responsibility to make interim releases and directs the FBI to provide *all* responsive records on *one* CD at the end of its processing of this request unless all the records will not physically fit on one CD.

However, Mr. Stein does not agree to pay an additional fee to receive records on a CD, and in the instance that such a fee is required, he will accept a paper copy of responsive non-audio/visual records. If a public interest fee waiver is granted, the previous statement is moot, as Mr. Stein expects that this will waive the charges for any CDs as well, thereby allowing the FBI to release the soft-copy records to him free of charge.

Your cooperation in this matter would be appreciated. If you wish to discuss this request, please do not hesitate to contact me.

Sincerely,

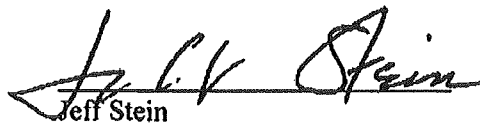


Kel McClanahan

**AUTHORIZATION AND PRIVACY WAIVER**

I, Jeff Stein, hereby authorize the law firm National Security Counselors and any attorney associated with it (collectively "my attorneys") to file Freedom of Information Act ("FOIA") requests on my behalf with any agency of the United States government. I am to be considered the "requester" in these instances and not my attorneys. I also authorize any agency of the United States government to discuss any FOIA requests filed by me or on my behalf with my attorneys. A photocopy of this authorization shall have the same effect as the original.

I do solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true to the best of my knowledge.

  
Jeff Stein

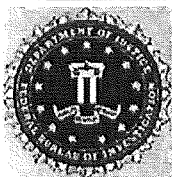
9/8/11  
Date

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. A. No. 1:13-cv-00556-RC
	)	
DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	

EXHIBIT O

U.S. Department of Justice



Federal Bureau of Investigation

Washington, D.C. 20535

September 15, 2011

MR. JEFF STEIN  
C/O KEL MCCLANAHAN, ESQ.  
NATIONAL SECURITY COUNSELORS  
SUITE 124  
1200 SOUTH COURTHOUSE ROAD  
ARLINGTON, VA 22204

FOIPA Request No.: 1173246- 000  
Subject: FBI RMD WEBSITE

Dear Mr. Stein:

This acknowledges receipt of your Freedom of Information/Privacy Acts (FOIPA) request to the FBI.

- ☒ This FOIPA request has been received at FBI Headquarters for processing.
- ☐ This FOIPA request has been received at the [\_\_\_\_\_] **Resident Agency /** [\_\_\_\_\_] **Field Office]** and forwarded to FBI Headquarters for processing.
- ☒ We are searching the indices to our Central Records System for the information responsive to this request. You will be informed of the results in future correspondence.
- ☒ Your request for a fee waiver is being considered and you will be advised of the decision at a later date.
- ☒ Please check for the status of your FOIPA request at [www.fbi.gov/foia](http://www.fbi.gov/foia)

The FOIPA Request number listed above has been assigned to your request. Please use this number in all correspondence concerning your request. Your patience is appreciated.

Very truly yours,

A handwritten signature in black ink, appearing to read "D. Hardy", is placed below the "Very truly yours," text.

David M. Hardy  
Section Chief,  
Record/Information

Dissemination Section

Records Management Division



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. A. No. 1:13-cv-00556-RC
	)	
DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	

EXHIBIT P

U.S. Department of Justice



Federal Bureau of Investigation

Washington, D.C. 20535

September 27, 2012

MR. JEFF STEIN  
 C/O KEL MCCLANAHAN, ESQ.  
 NATIONAL SECURITY COUNSELORS  
 SUITE 124  
 1200 SOUTH COURTHOUSE ROAD  
 ARLINGTON, VA 22204

Subject: FBI RMD WEBSITE

FOIPA No. 1173246- 000

Dear Mr. Stein:

The enclosed documents were reviewed under the Freedom of Information/Privacy Acts (FOIPA), Title 5, United States Code, Section 552/552a. Deletions have been made to protect information which is exempt from disclosure, with the appropriate exemptions noted on the page next to the excision. In addition, a deleted page information sheet was inserted in the file to indicate where pages were withheld entirely. The exemptions used to withhold information are marked below and explained on the enclosed Form OPCA-16a:

552a	Section 552	Section
<input type="checkbox"/> (b)(1)	<input type="checkbox"/> (b)(7)(A)	<input type="checkbox"/> (d)(5)
<input type="checkbox"/> (b)(2)	<input type="checkbox"/> (b)(7)(B)	<input type="checkbox"/> (j)(2)
<input type="checkbox"/> (b)(3) _____	<input checked="" type="checkbox"/> (b)(7)(C)	<input type="checkbox"/> (k)(1)
_____	<input checked="" type="checkbox"/> (b)(7)(D)	<input type="checkbox"/> (k)(2)
_____	<input checked="" type="checkbox"/> (b)(7)(E)	<input type="checkbox"/> (k)(3)
_____	<input type="checkbox"/> (b)(7)(F)	<input type="checkbox"/> (k)(4)
<input type="checkbox"/> (b)(4)	<input type="checkbox"/> (b)(8)	<input type="checkbox"/> (k)(5)
<input type="checkbox"/> (b)(5)	<input type="checkbox"/> (b)(9)	<input type="checkbox"/> (k)(6)
<input checked="" type="checkbox"/> (b)(6)		<input type="checkbox"/> (k)(7)

579 pages were reviewed and 567 pages are being released.

☐ Document(s) were located which originated with; or contained information concerning other Government agency(ies) [OGA]. This information has been:

☐ referred to the OGA for review and direct response to you.

☐ referred to the OGA for consultation. The FBI will correspond with you regarding this information when the consultation is finished.

☐ In accordance with standard FBI practice, this response neither confirms nor denies the existence of your subject's name on any watch lists.

☒ You have the right to appeal any denials in this release. Appeals should be directed in writing to the Director, Office of Information Policy, U.S. Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-0001. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly

marked "Freedom of Information Appeal." Please cite the FOIPA Number assigned to your request so that it may be easily identified.

☐ The enclosed material is from the main investigative file(s) in which the subject(s) of your request was the focus of the investigation. Our search located additional references, in files relating to other individuals, or matters, which may or may not be about your subject(s). Our experience has shown, when ident, references usually contain information similar to the information processed in the main file(s). Because of our significant backlog, we have given priority to processing only the main investigative file(s). If you want the references, you must submit a separate request for them in writing, and they will be reviewed at a later date, as time and resources permit.

☒ See additional information which follows.

Sincerely yours,



David M. Hardy  
Section Chief  
Record/Information  
Dissemination Section  
Records Management Division

Enclosures (2)

In response to your Freedom of Information Act (FOIA) request submitted to FBI Headquarters, enclosed is a processed copy of the FBI RMD Website, sections RMD Main Pages and FBI RMD Main Announcements.

In processing the responsive documents, the material considered for possible release include only material on the RMD website. Pages/documents/videos linked to the RMD website were not considered for possible release.

Your request for a waiver of fees has been denied. Our decision on this matter is based on the statutory standard and the fee waiver guidelines issued by the Department of Justice.

The enclosed documents on CD represent the first interim release of information responsive to your FOIA request. To expedite your request, the enclosed material is being sent in advance of payment. Pursuant to Title 28, Code of Federal Regulations, Sections 16.11 and 16.49, there is a fee of ten cents per page for duplication in excess of 100 pages or \$15.00 per CD. Please note that each CD can contain approximately 500 pages. The first 100 pages of duplication, or the cost equivalent (\$10.00) for releases on CD, will be provided to you at no charge and therefore no fees are being assessed for the first CD. Should you choose to receive additional releases by agreeing to pay the estimated duplication fees, you will be billed for the \$5.00 associated with this first release as well as the \$15.00 duplication fee for the second release for a total of \$20.00. Each subsequent release will be made at a cost of \$15.00.

We have located approximately 21,753 additional pages which are potentially responsive to your request. Pursuant to Title 28, Code of Federal Regulations (CFR), Sections 16.11 and 16.49, there is a duplication fee of ten cents per page. The first 100 free pages are enclosed. Regulations require us to notify requesters when anticipated charges exceed \$25, and if all of the pages are released, you will owe \$2175.30 in duplication fees to receive a paper copy or \$665.00 (44 CD's at \$15.00 plus \$5.00) to receive the release on CD. Please remember this is only an estimate, and if some of the pages are withheld or are not identifiable with your subject, the actual charges could be less.

You may want to consider reducing the scope of your request. This would allow you to lower your costs and hasten the receipt of your information. To streamline our operation, we divide our requests into three tracks based on the amount of material to be processed: small (1-500 pages); medium (501-2500 pages) and large (2501 or more pages), with the small track having the fastest rate of processing. To accelerate the processing of your request, you must reduce the pages to be processed to 500 pages or less. Please let us know in writing **within 30 days** if you are interested in discussing the possibility of reducing the scope of your request or if you are willing to pay the estimated duplication cost indicated in the above paragraph. Your written response should provide a telephone number where you can be reached between the hours of 8:00 a.m. and 5:00 p.m., EST. You may also fax your response to the following number: 540-868-4996, Attention: Work Processing Unit. You must include the FOIPA request number in any communication regarding this matter.

**EXPLANATION OF EXEMPTIONS****SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552**

- (b)(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified to such Executive order;
- (b)(2) related solely to the internal personnel rules and practices of an agency;
- (b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ( A ) could be reasonably be expected to interfere with enforcement proceedings, ( B ) would deprive a person of a right to a fair trial or an impartial adjudication, ( C ) could be reasonably expected to constitute an unwarranted invasion of personal privacy, ( D ) could reasonably be expected to disclose the identity of confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, ( E ) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or ( F ) could reasonably be expected to endanger the life or physical safety of any individual;
- (b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (b)(9) geological and geophysical information and data, including maps, concerning wells.

**SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a**

- (d)(5) information compiled in reasonable anticipation of a civil action proceeding;
- (j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;
- (k)(1) information which is currently and properly classified pursuant to an Executive order in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;
- (k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;
- (k)(4) required by statute to be maintained and used solely as statistical records;
- (k)(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service the release of which would compromise the testing or examination process;
- (k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his/her identity would be held in confidence.

FBI/DOJ

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. A. No. 1:13-cv-00556-RC
	)	
DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
_____	)	

EXHIBIT Q

**Sobonya, David P.**

---

**From:** Jason Leopold [jason@truthout.org]  
**Sent:** Tuesday, May 22, 2012 7:39 PM  
**To:** FOIPA\_Request  
**Subject:** Request for Documents Under the Freedom of Information Act

Dear FOIA Officer,

This is a request for documents under the Freedom of Information Act. I am seeking all FBI documents, which includes but is not limited to, emails, memos, transcripts, training materials, PowerPoint presentations, video and audio presentations, slides in which the FBI, its Joint Terrorism Task Force offices and/or so-called FBI "campus liaison agents" and the FBI's Campus Liaison Initiative work with and/or partner with college campus police chiefs and/or college campus administrators on confronting radical extremism and terrorism on college campuses throughout the country as well as the same documents pertaining to intelligence sharing arrangements between campus police chiefs, campus administrators and other officials and FBI, vice-versa. I am also seeking a list of and description of all of the threats reported to FBI field offices, agents, headquarters by university and/or college campus police and administrators from 2008 through the present.

Moreover, I am seeking all FBI documents, which includes but is not limited to, emails, memos, transcripts, training materials, PowerPoint presentations, video and audio presentations, slides, in which the FBI-led National Security Advisory Board and Federal Law Enforcement Training Center instructs local law enforcement on "physical techniques" to "behavioral science."

I request this information to be released in electronic format if possible. I request the FBI conduct a separate search all of its field offices for the information in addition to searching the Central Record System and any other databases in order to locate responsive records. I am lead investigative reporter of Truthout.org ([www.truthout.org/about](http://www.truthout.org/about)), an online news publication that publishes news and commentary seven days a week, 365 days a year.

If you regard these documents/files/records as potentially exempt from disclosure requirements, I request that you nonetheless exercise your discretion to disclose them. Please release all reasonably segregable nonexempt portions of documents. If you deny all or any part of this request, please cite each specific exemption you think justifies your refusal to release the information and notify me of appeal procedures available under the law.

If there are any fees for searching for, reviewing, or copying the records, please notify me before processing if the amount exceeds \$500. If you have any questions related to this request please contact me at 213 270 4334 or via email.

Kind regards,  
Jason Leopold

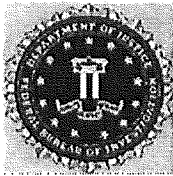
Jason Leopold  
Lead Investigative Reporter  
Truthout.org  
1669 Benedict Canyon Drive  
Beverly Hills, CA 90210  
[jason@truthout.org](mailto:jason@truthout.org)  
213 270 4334

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. A. No. 1:13-cv-00556-RC
	)	
DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	

EXHIBIT R

U.S. Department of Justice



Federal Bureau of Investigation

Washington, D.C. 20535

August 17, 2012

MR. JASON LEOPOLD  
1669 BENEDICT CANYON DRIVE  
BEVERLY HILLS, CA 90210

FOIPA Request No.: 1197184- 000  
Subject: FBI'S CAMPUS LIAISON INITIATIVE

Dear Mr. Leopold:

This acknowledges receipt of your Freedom of Information/Privacy Acts (FOIPA) request to the FBI.

- ☒ This FOIPA request has been received at FBI Headquarters for processing.
- ☐ This FOIPA request has been received at the [\_\_\_\_\_ Resident Agency / \_\_\_\_\_ Field Office] and forwarded to FBI Headquarters for processing.
- ☒ We are searching the indices to our Central Records System for the information responsive to this request. You will be informed of the results in future correspondence.
- ☐ Your request for a fee waiver is being considered and you will be advised of the decision at a later date.
- ☒ Please check for the status of your FOIPA request at [www.fbi.gov/foia](http://www.fbi.gov/foia)

The FOIPA Request number listed above has been assigned to your request. Please use this number in all correspondence concerning your request. Your patience is appreciated.

Very truly yours,

A handwritten signature in black ink, appearing to read "D. Hardy", is placed below the "Very truly yours," text.

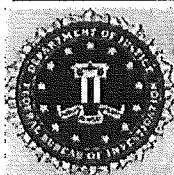
David M. Hardy  
Section Chief,  
Record/Information

Dissemination Section

Records Management Division



U.S. Department of Justice



Federal Bureau of Investigation

Washington, D.C. 20535  
August 17, 2012

MR. JASON LEOPOLD  
1669 BENEDICT CANYON DRIVE  
BEVERLY HILLS, CA 90210

FOIPA Request No.: 1197184- 000  
Subject: FBI'S CAMPUS LIAISON INITIATIVE

Dear Mr. Leopold:

This is in reference to your Freedom of Information Act (FOIA) request.

By letter dated May 22, 2012, you indicated your willingness to pay \$500. We have located approximately 26,000 pages which are potentially responsive to your request. Pursuant to the U.S. Department of Justice (DOJ) regulations, 28 C.F.R. §§ 16.11 and 16.49, there is a duplication fee of ten cents per page if you receive a paper copy. Releases are also available on CD upon request. Each CD contains approximately 500 pages per release. The 500 page estimate is based on our business practice of processing medium and large track cases through interim releases that generally equal approximately 500 pages. The first 100 pages of duplication, or the cost equivalent (\$10.00) for releases on CD, will be provided to you at no charge. In accordance with the DOJ regulations, the FBI notifies requesters when anticipated fees exceed \$25.00. If all of the pages that are potentially responsive to your request are released, you will owe \$2590.00 in duplication fees to receive a paper copy or \$765 (52 CD's at \$15.00 less \$10.00) to receive the release on a CD. Please remember this is only an estimate, and if some of the pages are withheld in full pursuant to FOIA/Privacy Act exemption(s) or are determined to not be responsive to your request, the actual charges could be less.

To accelerate the processing of your request, you may wish to consider reducing the scope of your request so that it will fall within one of the smaller queues. This may allow you to lower your search and duplication costs and hasten the receipt of your information. The FBI uses a three-queue system as a way to fairly assign and process new requests. The placement of a request in one of the three queues depends on the total number of pages responsive to that request - 500 pages or less (small queue), 501 pages to 2500 pages (medium queue), or more than 2500 pages (large queue). The small queue has the fastest rate of processing. Please let us know in writing if you are interested in discussing the possibility of reducing the scope of your request, as well as your willingness to pay the estimated search and duplication costs indicated in the above paragraph. Your written response should provide a telephone number where you can be reached between the hours of 8:00 a.m. and 5:00 p.m., EST, if one is available. Please send this response to: Work Process Unit, Record Information/Dissemination Section, Records Management Division, Federal Bureau of Investigation, 170 Marcel Drive, Winchester, VA 22602. You may also fax your response to the following number: 540-868-4997, Attention: Work Process Unit.

**No payment is required at this time.** However, you must notify us in writing within thirty (30) days from the date of this letter of your format decision (paper or CD) and your commitment to pay the estimated fee. If we do not receive your commitment to pay within thirty (30) days of the date of this notification, your request will be closed. Please include the FOIPA Request Number listed above in any communication regarding this matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "D. Hardy", is located below the "Sincerely yours," text.

David M. Hardy  
Section Chief,  
Record/Information  
Dissemination Section  
Records Management Division

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
		)	
Plaintiffs,		)	
		)	
v.		)	Civ. A. No. 1:13-cv-00556-RC
		)	
DEPARTMENT OF JUSTICE,		)	
		)	
Defendant.		)	
<hr/>		)	

EXHIBIT S

## NATIONAL SECURITY COUNSELORS

1200 SOUTH COURTHOUSE ROAD  
SUITE 124  
ARLINGTON, VA 22204

TELEPHONE: (301) 728-5908  
FACSIMILE: (240) 681-2189

KEL MCCLANAHAN, ESQ., EXECUTIVE DIRECTOR (admitted in NY, DC)  
EMAIL: KEL@NATIONALSEcurityLAW.ORG  
BRADLEY P. MOSS, ESQ., DEPUTY EXECUTIVE DIRECTOR (admitted in IL, DC)  
EMAIL: BRAD@NATIONALSEcurityLAW.ORG

7 September 2012

Melanie Ann Pustay  
Director  
Office of Information Policy  
U.S. Department of Justice  
1425 New York Avenue, NW  
Suite 11050  
Washington, DC 20530-0001

Re: FBI FOIA Request #1197184-000

Dear Ms. Pustay:

I am writing on behalf of my client Truthout in response to Mr. Hardy's 17 August 2012 response to the above indicated FOIA request. Truthout hereby appeals the determination that the FBI will only release 500 pages of records per CD, thereby requiring the payment of significantly more duplication fees than would be necessary if the CDs were filled to capacity.


The FBI claims that this 500-page restriction is in place to allow it to make interim releases. Specifically, "The 500 page estimate is based on our business practice of processing medium and large track cases through interim releases that generally equal approximately 500 pages." Accordingly, Truthout specifically absolves the FBI of its responsibility to make interim releases and directs the FBI to fill each CD to capacity and charge Truthout accordingly for the actual number of CDs used. This means that the FBI may *not* arbitrarily limit each CD to approximately 500 pages.

For the above stated reasons, please reverse the FBI's determination and order the FBI to provide all pages responsive to this request on the fewest possible CDs.

So that the FBI can continue to process this request while you consider this appeal, Truthout does commit to paying the \$765 duplication fee if you affirm the FBI's initial determination. However, Truthout reserves the right to seek judicial review of an unfavorable appeal decision on this matter, with the intent of reducing the fees to account for the proper number of CDs the FBI *should have* used.

Your cooperation in this matter would be appreciated. If you wish to discuss this appeal, please do not hesitate to contact me.

Sincerely,



Kel McClanahan

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. A. No. 1:13-cv-00556-RC
	)	
DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	

EXHIBIT T



U.S. Department of Justice

Office of Information Policy

Telephone: (202) 514-3642

Washington, D.C. 20530

SEP 26 2012

Kel McClanahan, Esq.  
National Security Counselors  
Suite 124  
1200 South Courthouse Road  
Arlington, VA 22204

Re: Request No. 1197184 - Truthout

Dear Mr. McClanahan:

This is to advise you that your administrative appeal from the action of the Federal Bureau of Investigation was received by this Office on September 7, 2012.

The Office of Information Policy has the responsibility of adjudicating such appeals. In an attempt to afford each appellant equal and impartial treatment, we have adopted a general practice of assigning appeals in the approximate order of receipt. Your appeal has been assigned number **AP-2012-03398**. Please mention this number in any future correspondence to this Office regarding this matter.

We will notify you of the decision on your appeal as soon as we can. If you have any questions about the status of your appeal you may contact me at the number above.

Sincerely,

A handwritten signature in black ink, appearing to read "Priscilla Jones", written over a horizontal line.

Priscilla Jones  
Supervisory Administrative Specialist

FILE COPY

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
		)	
Plaintiffs,		)	
		)	
v.		)	Civ. A. No. 1:13-cv-00556-RC
		)	
DEPARTMENT OF JUSTICE,		)	
		)	
Defendant.		)	
<hr/>		)	

EXHIBIT U



U.S. Department of Justice  
Office of Information Policy  
Suite 11050  
1425 New York Avenue, NW  
Washington, DC 20530-0001

Telephone: (202) 514-3642

MAR 12 2013

Kel McClanahan, Esq.  
National Security Counselors  
Suite 124  
1200 South Courthouse Road  
Arlington, VA 22204

Re: Appeal No. AP-2012-03398  
Request No. 1197184  
MTC:BT

Dear Mr. McClanahan:

You appealed on behalf of your client, Truthout, from the fee determination made by the Federal Bureau of Investigation on its request for access to records concerning the FBI's Campus Liaison Initiative.

I have been informed that you filed a lawsuit concerning the FBI's action in the United States District Court for the District of Columbia. Inasmuch as this matter is now before the Court, I am closing your appeal file in this Office in accordance with 28 C.F.R. § 16.9(a)(3) (2012).

Sincerely,

A handwritten signature in black ink, appearing to read "Sean R. O'Neill".

Sean R. O'Neill  
Chief  
Administrative Appeals Staff

FILE COPY



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. A. No. 1:13-cv-00556-RC
	)	
DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
_____	)	

**SECOND DECLARATION OF DAVID M. HARDY**

I, David M. Hardy, declare as follows:

(1) I am the Section Chief of the Record/Information Dissemination Section ("RIDS"), Records Management Division ("RMD"), located to Winchester, Virginia. I have held this position since August 1, 2002. Prior to my joining the Federal Bureau of Investigation ("FBI"), from May 1, 2001 to July 31, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act ("FOIA") policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the State of Texas since 1980.

(2) In my official capacity as Section Chief of RIDS, I supervise approximately 261 employees who staff a total of ten (10) FBI Headquarters ("FBIHQ") units and two (2) field operational service center units whose collective mission is to effectively plan, develop, direct, and manage responses to requests for access to FBI records and information pursuant to the

FOIA as amended by the OPEN Government Act of 2007 and the OPEN FOIA Act of 2009; Privacy Act of 1974; Executive Order 13,526, Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. Specifically, I am aware of the treatment that has been afforded National Security Counselor's FOIA request for the Manual of Administrative Operations and Procedures ("MAOP"), as well as RIDS's decisions about fees with respect to all three FOIA requests at issue in this lawsuit. I am also aware of the protocol adopted and followed by RIDS for assessing and charging fees associated with the processing of FOIA requests, and specifically the policy for charging fees associated with the production of responsive records on compact discs ("CDs").


(4) This is my second declaration in this case, and incorporates and supplements my first declaration ("1<sup>st</sup> Hardy Decl."). *See* Docket ("Dkt.") No. 12-2. This declaration is being submitted in further support of defendant's motion for summary judgment.

(5) The letter attached to my first declaration as Exhibit L referenced an April 22, 2011, letter to plaintiff National Security Counselors from the Department of Justice ("DOJ"), Office of Information Policy ("OIP"), in which OIP provides a detailed explanation of the FBI's fee policy regarding production of responsive records on CDs. *See* 1<sup>st</sup> Hardy Decl. at ¶ 18, Exhibit L. The referenced April 22<sup>nd</sup> letter is attached hereto as **Exhibit A**.

(6) In my first declaration, I explained that the FBI's policy regarding production of responsive records on CDs derives from and/or is the FBI's effort to comply with three DOJ FOIA regulations – 28 C.F.R. §§ 16.5(b), 16.6(b), and 16.11(c)(2). *See* 1<sup>st</sup> Hardy Decl., ¶ 33. To clarify, § 16.5(b) provides that components may establish multiple processing tracks that distinguish between simple and complex requests, based on the amount of work and/or time needed to process the request, and § 16.6(b) provides that components shall provide written notice to a requester of any fees being charged for processing a FOIA request and upon receipt of payment of applicable fees, shall promptly disclose responsive material to the requester. The FBI developed its CD policy based upon, and in an effort to comply with, these regulations, as well as § 16.11(c)(2), as more fully described and explained in my first declaration. *See* 1<sup>st</sup> Hardy Decl., ¶ 33.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, and that Exhibit A attached hereto is a true and correct copy.

Executed this 31<sup>st</sup> day of December 2013.

  
DAVID M. HARDY  
Section Chief  
Record/Information Dissemination Section  
Records Management Division  
Federal Bureau of Investigation  
Winchester, Virginia

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. A. No. 1:13-cv-00556-RC
	)	
DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
_____	)	

**SECOND DECLARATION OF DAVID M. HARDY**

**Exhibit A**



U.S. Department of Justice

Office of Information Policy

Telephone: (202) 514-3642

Washington, D.C. 20530

APR 22 2011

Kel McClanahan, Esq.  
National Security Counselors  
Suite 124  
1200 South Courthouse Road  
Arlington, VA 22204

Re: Appeal No. AP-2011-00113<sup>1</sup>  
JGM:MTC

Dear Mr. McClanahan:

You appealed from the action of the Federal Bureau of Investigation on the handling of your request for access to records concerning ten individuals and organizations listed in your initial request and referred to in your letter as "parties."

Your appeal concerns multiple issues: 1) your entitlement to 100 free pages and two hours of search per request; 2) the FBI's practice of "limiting" CD-ROMs to 500 pages per CD-ROM; 3) its practice of providing you with a separate CD-ROM for each of the subjects of your request; 4) its charging of a cost of \$15.00 per CD-ROM; and 5) what you characterize as its decision to aggregate the fees for the subjects of your request. Further you challenge the adequacy of the search conducted by the FBI for those subjects identified in your appeal letter as Request Nos. 1400405-002 (Scott Hodes), 11400406-002 (James Madison Project), and 11400412-002 (National Security Counselors). All fee matters are addressed in this appeal response; your challenge to the adequacy of the FBI's search for three of the subjects will be addressed in a separate letter.

After careful consideration of your appeal and as a result of discussions between FBI personnel and this Office, I am granting your appeal in part. The FBI and this Office are in agreement that the cost of the first CD-ROM for any request should reflect a deduction made for the cost equivalent of 100 pages of records (currently \$10.00) in consideration of the statutory

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<sup>1</sup> Your appeals are numbered AP-2011-00113 through AP-2011-00119 based on the seven request numbers provided in the subject line of your appeal. The corresponding FBI Request Nos. are 1140395, 1140405, 1140406, 1140408, 1140411, 1140412, and 1140416, each of which has the "002" extension. I note that you mention in the body of your appeal letter that "[you] would close completely" an eighth FBI request, No. 1140411-002. (K. McClanahan letter to Office of Information Policy dated October 17, 2010 at 2.) Not accounted for in your appeal letter are FBI requests numbered 1140403 and 1140421. It is presumed that the subject matters associated with these two numbers are not in contention.

FBI ABR  
4/29/11

-2-

provision providing certain requesters with 100 pages at no cost per request (when aggregation is not an issue). This would mean that for any request where a single CD-ROM is released and there is no search time to be charged, there would be no cost to the requester for that CD-ROM.<sup>2</sup> In instances where in response to a request, multiple CD-ROMs are released, the \$10.00 "cost equivalent" deduction would be taken from the cost of the first CD-ROM. Further, you are also entitled to two free hours of search per request (except as limited below). To the extent that the FBI's estimated search fee did not account for the two hours of search time to which you are entitled at no cost, the total fee owed will likewise be adjusted to reflect a deduction for the cost of two hours of search time.

I am otherwise affirming the FBI's determination. You raise a concern with regard to the FBI's practice of loading approximately 500 pages onto each CD-ROM released. The 500-page limit was established by the FBI both to facilitate the making of interim releases and to ensure an efficient FOIA process. The FBI has reasonably determined that the approximate minimum number of pages for one subject that will be saved to a CD-ROM as part of an interim release is 500 pages. The FBI does not abruptly stop loading records onto a CD-ROM once it reaches 500 pages. Through many years of experience and experimenting with workload distribution, in addition to consideration of its computer system capabilities, the FBI has developed a system for processing records that maximizes efficiency and provides responsive records to the largest number of requesters in the shortest amount of time. The FBI, for instance, has found that it is much more efficient to divide multi-subject requests among more than one processor rather than to assign such a request to one individual. This is a benefit to both the component and the requester. It likewise strives to make interim releases for large-volume requests. While 500 pages is an approximate number of pages to be included on each CD-ROM, that number generally varies with each release. As but one example, one of the subjects of your request received a release of 679 pages on a single CD-ROM. Thus, placing an approximate number of pages (500) on each CD-ROM moves records through the various processing stages more quickly and efficiently.

Likewise placing a limit on the number of subjects per CD-ROM makes processing multiple-subject requests, such as yours, much easier, especially when more than one processor is assigned to a multi-subject request. Rather than "sharing" a single CD-ROM, multiple processors process and download discrete subjects onto separate CD-ROMs, not for the purpose as you suggest of "maximizing the amount of money [you] would have to pay," but to process the records and get them to you as quickly as possible. Providing a tracking number for each of the subjects of a multi-subject request enhances the ability to provide information quickly to supervisors as well as to inform requesters of the status of a particular subject. Accordingly, I find that the FBI's 500-page minimum and its practice of placing separate subjects on separate CD-ROMs is reasonable.

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<sup>2</sup> This determination takes into account both a deduction for the cost equivalent of 100 pages (\$10.00) as well as the Department's threshold of \$14.00, at or below which no fee is charged. See 28 C.F.R. § 16.11(d).

-3-

As you are likely aware, Department regulations, based on the guidance provided by the Office of Management and Budget,<sup>3</sup> provide for the assessment of "direct costs" when a medium other than paper is used. "For copies produced by computer . . . components will charge the direct costs, including operator time, of producing that copy. For other forms of duplication, components will charge the direct costs of that duplication." 28 C.F.R. § 16.11(c)(2); see also 28 C.F.R. § 16.11(b)(2). Nonetheless, the FBI has not passed all of the "direct costs" of preparing a CD-ROM for release on to the requester. It is my understanding that none of the costs associated with scanning responsive documents into a pdf file prior to loading records onto a CD-ROM have been passed on to any requester. Additionally, because all FBI FOIA requests are processed on its classified computer network, when a CD-ROM is prepared for release, it must undergo a more stringent process than simply saving the information to a CD-ROM. The CD-ROM must be run through an additional software application before it can be released and the cost of running this application (which takes approximately one hour for a 500-page release) exceeds the \$15 fee assessed by the FBI per CD-ROM. Accordingly, I find that the \$15 fee charged by the FBI per CD-ROM is reasonable.

Please be assured that there is no financial incentive for the FBI to use more than one CD-ROM. As I am sure you know, all FOIA fees collected are ultimately deposited into the United States Treasury and not into individual agency accounts. See Uniform Freedom of Information Act Fee Schedule and Guidelines [hereinafter OMB Guidelines], 52 Fed. Reg. 10012 (Mar. 27, 1987) ("funds agencies receive for providing FOIA services are to be deposited in the general revenues of the United States rather than individual agency accounts").

In your challenge to what you claim is the FBI's aggregation of the multiple subjects of your single request for purposes of determining the number of free pages to which you are entitled, you suggest that this issue has already been decided in this Office's letter dated May 20, 2010. That letter, written in response to your fee waiver/fee category appeal, made no determination on any aggregation issue as the issue was not raised by you in that appeal. As support for your position you refer to a sentence in the second to last paragraph of that letter which stated that "NSC is a non-commercial, non-media requester and is entitled to two free hours of search time and one hundred free pages of responsive records per request." That statement is accurate; your interpretation of it, however, is incorrect. As a non-commercial entity and non-media requester your organization is entitled to certain free services per request. The answer to the question you now raise hinges on whether you submitted a single request or multiple requests to the FBI. By your own hand you describe your single letter as "a request" for records on "ten parties." I concur.

The FBI, upon receipt of your single request, assigned each of the ten subjects a separate FOIPA number for purposes of tracking, administrative convenience, and processing efficiency. These administrative considerations do not transform your single request into multiple unrelated

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<sup>3</sup> OMB Fee Guidelines can be found at 52 Fed. Reg. 10012 (Mar. 27, 1987). See, e.g., 52 Fed. Reg. at 10017-18.

-4-

requests for purposes of determining the number of free pages to which you are entitled. See 28 C.F.R. § 16.11(h) (2010); see also OMB Guidelines, Sec. 9c, 52 Fed. Reg. at 10020. Further, had you submitted ten separate letters to the FBI, each for a different individual or organization, but for the same types of records for each, under Department regulations, I would have considered them as a series of related requests and allowed aggregation under the Department regulation cited to immediately above.

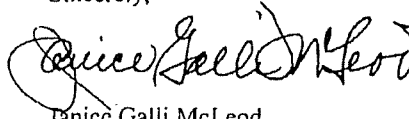
In sum, you are entitled to receive the benefit of the "cost equivalent" of 100 pages of records if you choose to receive responsive records on a CD-ROM. You are likewise entitled to two free hours of search time. The cost equivalent will be applied to each request submitted by you unless aggregation applies with regard to multiple requests. In this instance because you submitted a single request, albeit with multiple subjects, each of which were assigned separate FOIPA numbers simply for tracking purposes, processing efficiency, and administrative convenience, you are entitled to 100 free pages and two hours search for this single request.

Please be advised that this Office's decision was taken only after a full review of this matter. Your appeal was assigned to an attorney with this Office who thoroughly reviewed and analyzed your appeal, your underlying request, and the actions of the FBI in response to your request.

If you are dissatisfied with my action on your appeal, the FOIA permits you to file a lawsuit in federal district court in accordance with 5 U.S.C. § 552(a)(4)(B).

For your information, the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; e-mail at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 301-837-1996; toll free at 1-877-684-6448; or facsimile at 301-837-0348.

Sincerely,



Janice Galli McLeod  
Associate Director



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, *et al.*,

Plaintiffs,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

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Civ. A. No. 1:13-cv-00556-RC

**THIRD DECLARATION OF DAVID M. HARDY**

I, David M. Hardy, declare as follows:

(1) I am the Section Chief of the Record/Information Dissemination Section (“RIDS”), Records Management Division (“RMD”), in Winchester, Virginia. I have held this position since August 1, 2002. Prior to my joining the Federal Bureau of Investigation (“FBI”), from May 1, 2001 to July 31, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act (“FOIA”) policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the State of Texas since 1980.

(2) In my official capacity as Section Chief of RIDS, I supervise approximately 248 employees who staff a total of ten (10) Federal Bureau of Investigation Headquarters (“FBIHQ”) units and two (2) field operational service center units whose collective mission is to effectively plan, develop, direct, and manage responses to requests for access to FBI records and information pursuant to the FOIA as amended by the OPEN Government Act of 2007 and the OPEN FOIA

Act of 2009; the Privacy Act of 1974; Executive Order 13526; Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to Plaintiff's request for information pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a. Specifically, I am aware of the treatment that has been afforded National Security Counselor's FOIA request for the Manual of Administrative Operations and Procedures ("MAOP"), as well as RIDS' decisions about fees with respect to all three FOIA requests at issue in this lawsuit. I am also aware of the protocol adopted and followed by RIDS for assessing and charging fees associated with processing FOIA requests and issuing releases on compact discs ("CD").

(4) The FBI submits this declaration in response to the United States Court of Appeals' ("USCA") remand on the issue of fee assessment. More specifically, it addresses whether the \$15.00 assessed fee exceeds direct costs. The Court "require[s] only that the agency provide a sufficient factual basis upon which the district court can make the determination that the fees assessed under the interim release policy do not exceed direct costs." *See* USCA's Opinion dated February 14, 2017, p. 10. First, I will describe the Integrity process in greater detail, as well as the steps for preparing a release on CD. Second, I will explain the direct costs associated with a CD release and how those costs exceed the \$15 assessed fee. This is my third declaration and the FBI's fourth overall declaration in this case. It incorporates all previous declarations

dated September 17, 2013 (hereinafter “First Hardy Declaration”), December 3, 2013 (hereinafter “Second Hardy Declaration”), and March 14, 2014 (hereinafter “First Argall Declaration”).

## **I. INTEGRITY PROGRAM AND EMPLOYEE ENGAGEMENT**

### **A. Integrity Program**

(5) The Court states “the Hardy Declaration’s explanation of the Integrity program lacks adequate specificity to determine whether, and to what extent, the 50-minute period for running the program involves employee engagement rather than idle time.” *Id* at 9. In response, the FBI provides greater detail herein regarding the Integrity program and the employee involvement required in preparing and conducting a security scan.

(6) As stated in the First Hardy Declaration, the process by which the FBI produces a CD to a requester involves running a security protocol utilizing the Integrity program in which the FBI moves records from its FOIA Document Processing System (“FDPS”), which is a classified computer network on which records responsive to FOIA requests are processed, to a non-classified computer network from which a CD can be prepared for release. As stated in the First Hardy Declaration, RIDS personnel expends approximately 50 minutes to conduct a security scan through the Integrity program. *See* First Hardy Decl. ¶ 33(d) n. 18. This is a good-faith estimate of the entire Integrity process from preparing the text documents to resolving issues noted in the reports. The Integrity process entails the following major steps which require individual action, review and analysis: (1) document conversion, (2) Integrity scan, and (3) resolution of issues.

**i. Document Conversion**

(7) First, the Government Information Specialist (“GIS”) must export each section of the release from FDPS to their local computer drive. A release can include multiple sections. The GIS must export each section as a multi-page TIF<sup>1</sup> file. The GIS renames each section and saves them to the common shared drive. Integrity is unable to read TIF files so each page must be converted into single-page text documents. The GIS’ computer is unable to convert the files; therefore, this part of the conversion is performed on designated computers. The GIS retrieves the sections and saves each page as a single-page text document onto the shared drive. This completes the conversion process. The GIS then retrieves the text documents from the shared drive and saves them to their local drive in preparation of the Integrity scan.

**ii. Integrity Scan**

(8) Second, the GIS prepares for the Integrity scan. As previously stated, the Integrity program uses two policies when conducting a scan – a general security policy and a custom policy. *See* First Hardy Decl. ¶ 33(c). The general security policy is comprised of standard code words used in every scan; however, the custom policy is created by the GIS and unique to each specific FOIA request. The custom policy requires analysis and an independent assessment by the GIS based on the GIS’ knowledge of the case and relevant context. The GIS must identify, develop, and implement case specific key words which includes a variety of exempt words, names, confidential sources, symbol source numbers, classified techniques, and any other terms deemed sensitive or classified. The GIS reflects upon the processed records, notes all sensitive or classified terms, and includes them in creating the custom policy.

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<sup>1</sup> TIF or TIFF stands for “Tagged Image Format File.” TIF is an image format file for high-quality graphics.

(9) The GIS imports the custom policy into the Integrity program, and scans it against each text document. After the scan is finished, the GIS must conduct a manual review of the results. Specifically, the scan produces an Integrity report indicating a pass or fail result. If Integrity produces a pass report, then the GIS can proceed with preparing the release package; however, a fail requires the GIS to review and resolve each issue. Both the automated scan and manual review are necessary to ensure information is ready to be outputted from the classified FDPS environment to an unclassified information environment suitable for public dissemination and to prevent the inadvertent release of sensitive or classified information.<sup>2</sup> The GIS follows the same process in conducting a scan of the general security policy against each single-page text document, which produces a second report. The GIS must run the two scans (the scan using the custom policy and the scan using the general security policy) separately, review each report, and resolve any issues or “fails” identified in the reports.

### iii. **Issue Resolution**

(10) Third, the GIS must resolve all issues or “fails.” The reports list every instance in which a word, from the custom or general policy, is detected as un-redacted within the text documents. The reports generate a significant number of “false” fails that are random and incomplete references to unrelated individuals or subjects. For example, if the general or custom policies list the term “DEA” for Drug Enforcement Administration, then every instance of this letter sequence; i.e., “**deaf**,” “**death**,” “**dead**,” “**dean**,” “**deal**,” “**dear**,” will result in a fail. The reports can produce numerous fails resulting in considerable work because the GIS must review each fail, comparing it to the corresponding page in FDPS, and determine whether it is a true or

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<sup>2</sup> An inadvertent release is an accidental or unintended release of exempt information.

false fail. The GIS must ensure each release of the word is correct and not inadvertent.<sup>3</sup> Finally, if the GIS determines the fail is, in fact, an inadvertent release, then the identified error must be corrected on the relevant pages in FDPS and the entire Integrity process starts over.

**B. Burning a CD and Preparing the Release Package**

(11) After resolving issues, the GIS proceeds with preparing the release package by exporting all sections from FDPS into an unclassified PDF format outside FDPS. Each section is then transferred from the external FDPS location to a software program used for authoring CDs. After the CD is burned, the GIS prepares the physical release package.

**II. DIRECT COSTS EXCEED ASSESSED FEE**

(12) The Court states “[w]e require only that the agency provide a sufficient factual basis upon which the district court can make the determination that the fees assessed under the interim release policy do not exceed direct costs.” *See* USCA’s Opinion dated February 14, 2017, p. 9. As such, the FBI explains the direct costs associated with preparing and conducting the Integrity protocol.

(13) Integrity protects the transfer of information from a classified network to an unclassified format. It is a multi-step information security review which requires considerable employee engagement. As described above, the GIS is active through a majority of the process. Again, the FBI provided an estimate of 50 minutes to perform the Integrity scan. *See* First Hardy Decl. at ¶ 33(d) n. 18. This is a good-faith estimate based on experience, the number of necessary steps, and the amount of work required by the GIS to complete each step. Each step must be performed by the GIS despite the size of the release. It is the level of GIS engagement;

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<sup>3</sup> Words can be released in certain instances and not in others depending on context, segregability, and foreseeable harm to an interest protected by an exemption.

i.e., the direct labor costs, which underpin the \$15 assessed fee.

(14) The direct labor costs associated with running Integrity exceed \$15.00. As stated in the First Hardy Declaration, the average GIS responsible for preparing and running Integrity range in grade from GS-11 to GS-13. *Id.* Based on the 2013 Salary Table issued by the Office of Personnel Management for the Washington, D.C. locality, the minimum hourly salary is \$29.93 per hour (GS-11, Step 1) and the maximum is \$55.46 (GS-13, Step 10). *Id.* Thus, the average direct labor cost associated with a 50-minute Integrity scan for a GS-11, Step 1 is \$24.50 and a GS-13, Step 10 is \$46.00. These figures do not include labor costs for burning the CD or preparing the physical release package, as well as other direct costs such as CDs, postage, envelope, etc. These totals are based on 2013 salary rates and, though the \$15 CD fee has not changed since 2013, the government employees' yearly salary has increased. Despite the increase in labor costs, the FBI has maintained its policy of \$15 per CD. Thus, the direct costs associated with a CD release exceeds the assessed fee.

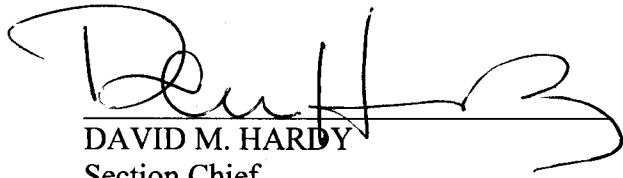
### **CONCLUSION**

(15) The purpose and function of the Integrity program is to ensure information is ready to be transferred from a classified FDPS environment to an unclassified information environment suitable for public dissemination, and to prevent the inadvertent release of sensitive or classified information. As explained above, the Integrity process is a multi-step security review which requires considerable employee engagement. It is the level of GIS engagement which underpins the \$15 assessed fee. The Court requested the FBI to "provide a sufficient factual basis upon which the district court can make the determination that the fees assessed under the interim release policy do not exceed direct costs." *See* USCA's Opinion dated February 14,

2017, p. 10. In response, the FBI provided an in-depth description of the Integrity process and the high level of required employee engagement, as well as explained how the direct costs associated with a CD release exceed the \$15 assessed fee.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 7<sup>th</sup> day of June 2017.

A handwritten signature in black ink, appearing to read "D. Hardy", written over a horizontal line.

DAVID M. HARDY  
Section Chief  
Record/Information Dissemination Section  
Records Management Division  
Federal Bureau of Investigation  
Winchester, Virginia



**United States Court of Appeals**  
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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Argued September 6, 2016

Decided February 14, 2017

No. 15-5117

NATIONAL SECURITY COUNSELORS AND JEFFREY STEIN,  
APPELLANTS

v.

UNITED STATES DEPARTMENT OF JUSTICE,  
APPELLEE

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Appeal from the United States District Court  
for the District of Columbia  
(No. 1:13-cv-00556)

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*Kelly B. McClanahan* argued the cause and filed the  
briefs for appellants.

*Brian P. Hudak*, Assistant U.S. Attorney, argued the  
cause for appellee. With him on the brief was *R. Craig  
Lawrence*, Assistant U.S. Attorney.

Before: BROWN, SRINIVASAN, and WILKINS, *Circuit  
Judges*.

Opinion for the Court filed by *Circuit Judge* SRINIVASAN.

SRINIVASAN, *Circuit Judge*: The Freedom of Information Act generally provides for persons to request the disclosure of records retained by administrative agencies. FOIA also addresses the charging of fees by agencies to process the release of records.

This case involves challenges raised by two separate FOIA requesters to the fees assessed against them by the Department of Justice for processing their requests for records. One requester argues that the fees assessed against him exceed the amounts permitted by the statute. The other contends that its request falls within a statutory waiver of fees for certain disclosures furthering the public's understanding of government operations. The district court denied both claims and awarded summary judgment to the Department. We affirm the district court's rejection of the second requester's argument for a statutory waiver of fees, but we vacate and remand for further proceedings with regard to the first requester's challenge to the amount of fees assessed against him.

## I.

The first fee dispute involved in this case concerns a September 13, 2011, FOIA request submitted to the Federal Bureau of Investigation by appellant Jeffrey Stein. Stein is a columnist and blogger who writes about national security issues. He sought disclosure of "all pages on the internal Federal Bureau of Investigation ('FBI') Records Management Division ('RMD') website, . . . as well as all documents, images, audio and video files, and any other files posted on the RMD website." FOIA Request from Jeff Stein to David M. Hardy, Chief, FBI Record/Info. Dissemination Section (Sept. 13, 2011). The FBI, a component of the Department of Justice, responded to Stein's request by releasing, free of

charge, a CD containing an initial 567 pages of responsive material. The agency further conveyed that it had located an additional 21,753 responsive pages, which the agency would produce for Stein on multiple CDs if he paid a fee of \$665. The FBI calculated that fee pursuant to its interim release policy, under which it responds to large document requests by burning a series of CDs, each of which contains a maximum of 500 pages of responsive documents. The agency charges requesters \$15 per CD.

Stein did not pursue any administrative appeal of that initial fee determination within the agency. Instead, he brought an action in district court, claiming that the FBI's fee policies, at least as they apply to large requests like his own, are inconsistent with FOIA.

The second fee dispute involved in this case arises out of two September 19, 2011, FOIA requests submitted to the Department of Justice by appellant National Security Counselors (NSC), a non-profit law firm. One of NSC's requests asked for documents concerning all FOIA cases handled by the Federal Programs Branch of the Department of Justice from 2000 to the present. The other request sought "all sworn declarations made by agency representatives as part of certain FOIA or Privacy Act litigation between 2002-2006, inclusive." FOIA Request from NSC to James M. Kovakas, FOIA/Privacy Act Officer, Dep't of Justice Civil Div. (Sept. 19, 2011). In conjunction with both requests, NSC asked for a waiver of charges under a FOIA provision mandating waiver or reduction of fees for certain disclosures deemed to be in the public interest. 5 U.S.C. § 552(a)(4)(A)(iii). The agency denied NSC's requests for a public-interest fee waiver.

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Stein and NSC brought an action under FOIA against the Department of Justice, contesting the fees assessed against them by the agency. The district court granted summary judgment in favor of the Department. Stein and NSC then brought this appeal.

## II.

We first consider Stein's challenge to the fees assessed by the FBI under its interim release policy for production of multiple CDs containing responsive documents. We review the district court's grant of summary judgment de novo. *See, e.g., Judicial Watch, Inc. v. U.S. Dep't of Justice*, 813 F.3d 380, 383 (D.C. Cir. 2016). We vacate the grant of summary judgment against Stein and remand for further proceedings.

### A.

As a threshold matter, the agency contends that Stein's failure to exhaust administrative remedies precludes judicial review of his challenge to the interim release policy. We are unpersuaded. Because a FOIA requester's failure to exhaust administrative remedies "is not [a] jurisdictional" bar to review, it is within our discretion to entertain Stein's arguments. *Hidalgo v. FBI*, 344 F.3d 1256, 1258 (D.C. Cir. 2003). Although "FOIA's administrative scheme favors treating failure to exhaust as a bar to judicial review," *id.* at 1259, we conclude that, in the specific circumstances of this case, the purposes of the exhaustion doctrine would not be served by declining to hear Stein's claim.

Stein filed this suit along with two other plaintiffs, NSC and an organization called Truthout (which did not join this appeal). While NSC asserted multiple claims, Stein and Truthout raised only one, in which they (together with NSC)

contested the FBI's fees under its interim release policy. Stein did not pursue any administrative appeal of the agency's assessment of fees under that policy, but both NSC and Truthout exhausted their administrative remedies.

We have previously elected to consider the claim of a party who failed to exhaust agency remedies when that party's claim and the claim of someone who did personally exhaust "are so similar that it can fairly be said that no conciliatory purpose would be served" by requiring exhaustion from both parties. *Foster v. Gueory*, 655 F.2d 1319, 1322 (D.C. Cir. 1981); *see also Cellnet Commc'n, Inc. v. FCC*, 965 F.2d 1106, 1109 (D.C. Cir. 1992). Here, when two co-plaintiffs jointly asserting precisely the same claim in the same action did exhaust, we elect to consider Stein's challenge notwithstanding his own failure to exhaust.

To be sure, neither of the co-plaintiffs presently stands alongside Stein in challenging the agency's fees for producing multiple CDs under the FBI's interim release policy: Truthout is not a party to the appeal at all, and NSC, while appealing on other grounds (*see* Part III, *infra*), retains no further stake as to this particular challenge because the FBI has disclosed, free of charge, the documents NSC requested in connection with the claim. Still, the fact remains that both Truthout and NSC exhausted administrative remedies with regard to the same claim brought jointly with Stein's in the same case. In the circumstances, denying review of Stein's companion claim on grounds of his own non-exhaustion would not serve the purposes of requiring administrative exhaustion—i.e., enabling the agency to "function efficiently" and to "have an opportunity to correct its own errors," "afford[ing] the parties and the courts the benefit of its experience and expertise," and "compil[ing] a record which is adequate for judicial review." *Weinberger v. Salfi*, 422 U.S.

749, 765 (1975). We therefore proceed to the merits of Stein's challenge.

B.

The agency submitted a declaration by David Hardy, the Chief of the Record/Information Dissemination Section at the FBI, in which it explained the basis for the \$665 fee assessment against Stein. Hardy Decl. ¶ 26 (Sept. 17, 2013). Under the FBI's interim release policy for large document requests, the FBI includes up to 500 pages of responsive documents on a single CD. Due to the confidential nature of many of its records, the FBI, before burning each CD, runs what it refers to as the "Integrity" protocol, a computer program that scans for "exempt words, names, confidential sources, or classified techniques" in responsive documents. *Id.* ¶ 33(c). For each 500-page CD, the Integrity protocol takes approximately 50 minutes to complete. The Hardy Declaration thus explains that, based on the applicable government pay scale for 50 minutes of operator labor, the "average operator cost for the Integrity process alone is \$39.50." *Id.* ¶ 33(d) n.18. The FBI releases completed CDs to requesters for \$15 apiece, a rate significantly less than the FBI's asserted labor costs for producing each CD. Because the FBI identified 21,753 pages of responsive material in addition to the initial 567-page CD of disclosures, the FBI offered to produce the remaining material on forty-four additional CDs, each containing up to 500 pages, for a total charge of \$660. The final charge of \$665 assessed against Stein includes a \$5 fee for the initial 567-page CD, which the FBI collects only if a requester elects to pay for additional disclosures.

FOIA imposes two salient limitations on the fees an agency can charge requesters. First, fees must "be limited to

reasonable standard charges.” 5 U.S.C. § 552(a)(4)(A)(ii). Second, an agency may recover “only the direct costs of search, duplication, or review.” *Id.* § 552(a)(4)(A)(iv). Stein asserts that the \$665 fee assessed against him under the interim release policy fails both requirements.

Stein first contends that the policy, by limiting the number of pages included on each CD to 500, produces fees exceeding “reasonable standard charges.” There is no dispute that each CD can hold far more than 500 pages of material. Stein demonstrated that the pages responsive to his request likely could have fit onto one CD rather than the forty-four CDs on which the agency proposed to disclose the documents. If the charges assessed under the interim release policy for producing forty-four CDs (rather than one) amounted to an improper inflation of fees “with a view to effectively denying access,” the policy would infringe FOIA. *Nat’l Treasury Emp’s Union v. Griffin*, 811 F.2d 644, 650 (D.C. Cir. 1987).

That is not the case here. The FBI regularly receives FOIA requests encompassing a massive number of responsive documents. Due to the time it takes the agency to run the Integrity protocol, the processing of a large request, if not divided into segments, could substantially delay disclosure to other requesters who seek a smaller number of documents. As explained in the Hardy Declaration, the interim release policy thus aims to enable the FBI “to develop multi-track processing with the goal of responding to more requests.” Hardy Decl. ¶ 33(a). By processing requests in 500-page increments, the policy ultimately “provides more pages to more requesters,” avoiding situations in which “a few, large queue requests monopolize finite processing resources.” *Id.* Far from giving rise to an improper inflation of fees that effectively denies access to requesters, the FBI’s interim

release policy serves to promote efficient responses to a larger number of requesters.

Because the agency has come forward with a reasonable, non-obstructionist explanation for the interim release policy's 500-page-per-CD limitation, that limitation does not result in a violation of FOIA's mandate that agencies recover only "reasonable standard charges." That is true even though the policy may, to some degree, increase the cost of disclosure for large requests. FOIA's reasonable-charge mandate, as Stein concedes, does not require an agency to adopt the lowest-cost method of responding to requests. Nor, relatedly, does that statutory mandate require the FBI to waive its interim release policy on request in individual cases. FOIA does not stand in the way of an agency's formulation and application of a reasonable, generally applicable release protocol. Because the FBI's justifications for its interim release policy relate to the efficient processing of requests, it can permissibly adhere to the standard 500-page limit in the face of a case-specific waiver request even if, as Stein observes, it occasionally exercises its discretion to release CDs containing more than 500 pages (as with the initial 567-page CD released to Stein).

Stein alternatively contends that the fees assessed under the interim release policy exceed the agency's "direct costs of search, duplication, or review." 5 U.S.C. § 552(a)(4)(A)(iv). His argument begins with the proposition that the FBI's estimation of its direct labor costs at \$39.50 per CD rests on an assumption that running the Integrity program requires 50 minutes of employee labor. Stein questions that assumption, arguing that it is unclear how much of the 50-minute time period needed to run the Integrity protocol in fact requires the actual involvement of an FBI operator. For instance, Stein submits, the agency's description of the Integrity program is consistent with a scenario in which an operator initially



activates the software but then sits idly by while the program processes documents with little or no ongoing employee engagement. If that were so, the FBI's labor costs associated with the Integrity program might fall well below the \$15-per-CD charge under the interim release policy. Because the FBI's account of its direct production expenses rests on the labor costs ostensibly associated with running the Integrity program, Stein argues that there remains a genuine issue, precluding the entry of summary judgment against him, concerning whether the agency's fees exceed its direct costs.

We agree with Stein that the Hardy Declaration's explanation of the Integrity program lacks adequate specificity to determine whether, and to what extent, the 50-minute period for running the program involves employee engagement rather than idle time. Of course, FOIA does not require an agency to document its labor or other production costs with the exactitude of minute-by-minute detail. But here, after the agency initially submitted its explanation of labor costs in the Hardy Declaration, which were grounded in its assertion that the Integrity program generally takes 50 minutes to run, Stein raised questions about whether that period involves any meaningful employee engagement. The FBI, despite its awareness of Stein's argument, gave no supplemental information addressing whether the operation of the Integrity program in fact entails any ongoing employee interaction. Given those circumstances, we conclude that there remained a genuine issue, foreclosing the entry of summary judgment, concerning whether the fees assessed by the agency exceeded its direct costs.

The agency notes that Stein's (and his co-plaintiffs') briefing in the district court at one point stated that it "is true" that "running Integrity on a single CD costs more than \$15." We do not read that statement to constitute a binding and

irrevocable concession that the direct costs of producing a single CD exceed the FBI's per-CD charge of \$15. Rather, we understand the statement, considered in context, to come into play only if one assumes that the Integrity process involves no idle time on the part of the operator. Otherwise, Stein's argument to the effect that the Integrity process might involve employee idle time—which Stein repeatedly urged in the district court (including on the next page of the same brief), and which necessarily calls into question whether the direct costs of producing a CD exceed the per-CD charge of \$15—would have been an entirely self-defeating one. Consequently, there remains a genuine issue of material fact concerning whether the direct costs of producing a CD exceed \$15.

In so ruling, we in no way mean to call into question the possibility that the agency will adequately demonstrate on remand that the FBI's labor (or other direct) costs under the interim release policy in fact equal or exceed \$15 per CD. Indeed, the agency might be able to do so in short order. We require only that the agency provide a sufficient factual basis upon which the district court can make the determination that the fees assessed under the interim release policy do not exceed direct costs.

### III.

We turn now to the second fee dispute at issue in this case, arising from NSC's requests for records concerning (i) post-2000 FOIA cases handled by the Department of Justice's Federal Programs Branch and (ii) sworn declarations made by Department representatives in connection with certain FOIA and Privacy Act litigation between 2002 and 2006. NSC claims entitlement to a waiver of fees for those requests pursuant to FOIA's provision establishing a waiver or

reduction of fees for certain disclosures in the public interest.  
5 U.S.C. § 552(a)(4)(A)(iii).

A waiver or reduction of fees under that provision rests on satisfaction of two requirements. First, a requester must show that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” *Id.* Second, a requester must show that disclosure is not “primarily in [its] commercial interest.” *Id.* Because the Department here concedes that NSC lacks any overriding commercial interest, the first requirement alone is in dispute. As to that requirement, the district court agreed with the Department that disclosure to NSC was unlikely to contribute significantly to public understanding of the government’s operations or activities. Limiting ourselves “to the record before the agency,” *id.* § 552(a)(4)(A)(vii), we review the denial of NSC’s fee-waiver request de novo, and affirm.

While fee-waiver applications are to be “liberally construed” in favor of finding that requesters meet FOIA’s two-prong test, requesters still must justify their entitlement to a waiver of fees in “reasonably specific” and “non-conclusory” terms. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003). Because NSC failed to provide adequate evidence suggesting that it would effectively disseminate its requested information in furtherance of the public’s understanding of government operations, we find that NSC failed to carry its burden to demonstrate its entitlement to a waiver of fees.

As we have explained, although a fee-waiver applicant need not demonstrate its ability to reach a “wide audience,” it must at least show that it can “disseminate the disclosed

records to a reasonably broad audience of persons interested in the subject.” *Cause of Action v. FTC*, 799 F.3d 1108, 1116 (D.C. Cir. 2015) (quoting *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 815 (2d Cir. 1994)). Here, we agree with the Department that, based on the state of NSC’s website at the time of its FOIA requests, it appeared to be “no more tha[n] . . . a clearing house for the records [it] receive[d]” through FOIA. Denial Letter from James M. Kovakas, FOIA/Privacy Act Officer, Dep’t of Justice Civil Div., to Kel McClanahan, Exec. Dir., NSC (Oct. 17, 2011); see *Home Page*, Nat’l Sec. Counselors (Sept. 20, 2011), <https://web.archive.org/web/20111104000523/http://nationalsecuritylaw.org>. In addition, the Department correctly noted that NSC did “not appear [to be] actively engaged in gathering information to produce” original publications, as “[t]he ‘NSC Publications’ section of [its] website contains only three publications, two of which were written . . . prior to NSC’s existence.” Denial Letter on Administrative Appeal from Janice Galli McLeod, Assoc. Dir., Dep’t of Justice Office of Info. Policy, to Kel McClanahan, Exec. Dir., NSC (May 22, 2012).

NSC, moreover, produced no information about the size of its audience or the amount of traffic received by its website. NSC’s own stated plans about its intended use of the tens of thousands of pages of records encompassed by its request indicated only that it hoped to perform “unbiased analyses,” “develop a predictive model,” “or at least write a white paper.” FOIA Requests from NSC to James M. Kovakas, FOIA/Privacy Act Officer, Dep’t of Justice Civil Div. (Sept. 19, 2011). It further suggested that “the raw statistical data mined from these records . . . would prove valuable to any person attempting to model the respective agencies’ FOIA implementation procedures, policies, patterns, and practices.” *Id.* NSC neither identified a

discernible audience for the disclosures in their raw form nor demonstrated its possession of the requisite scientific or technical sophistication to analyze and convey the data in a more broadly digestible form.

We have previously upheld a denial of a fee-waiver request in circumstances in which a requester “failed to identify the newspaper company to which he intended to release the requested information, his purpose for seeking the requested material, or his professional or personal contacts with any major newspaper companies.” *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988). Here, while NSC provided some barebones indication of how it intended to use its requested information, it similarly failed to provide sufficiently specific and non-conclusory statements demonstrating its ability to disseminate the disclosures to a “reasonably broad audience of persons interested in the subject.” *Cause of Action*, 799 F.3d at 1116. That deficiency “alone is a sufficient basis for denying the fee waiver request.” *Larson*, 843 F.2d at 1483. We therefore affirm the denial of NSC’s request for a public-interest fee waiver.

\* \* \* \* \*

For the foregoing reasons, we vacate the district court’s grant of summary judgment with respect to Stein’s claim and remand for further proceedings consistent with our opinion. We affirm the district court’s grant of summary judgment in favor of the Department in connection with NSC’s request for a public-interest fee waiver.

*So ordered.*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL SECURITY COUNSELORS, *et al.*,

Plaintiffs,

v.

Civ. A. No. 1:13-cv-00556-RC

DEPARTMENT OF JUSTICE,

Defendant.

### DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am the Section Chief of the Record/Information Dissemination Section ("RIDS"), Records Management Division ("RMD"), in Winchester, Virginia. I have held this position since August 1, 2002. Prior to my joining the Federal Bureau of Investigation ("FBI"), from May 1, 2001 to July 31, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act ("FOIA") policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the State of Texas since 1980.

(2) In my official capacity as Section Chief of RIDS, I supervise approximately 268 employees who staff a total of ten (10) FBI Headquarters ("FBIHQ") units and two (2) field operational service center units whose collective mission is to effectively plan, develop, direct, and manage responses to requests for access to FBI records and information pursuant to the FOIA

as amended by the OPEN Government Act of 2007 and the OPEN FOIA Act of 2009; Privacy Act of 1974; Executive Order 13526, Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. Specifically, I am aware of the treatment that has been afforded National Security Counselor's FOIA request for the Manual of Administrative Operations and Procedures ("MAOP"), as well as RIDS's decisions about fees with respect to all three FOIA requests at issue in this lawsuit. I am also aware of the protocol adopted and followed by RIDS for assessing and charging fees associated with the processing of FOIA requests, and specifically the policy for charging fees associated with the production of responsive records on compact discs ("CDs").

(4) This declaration is being submitted in support of defendant's motion for summary judgment.

**FOIPA REQUEST NUMBER 1148707 - REQUEST FOR THE MAOP**

(5) By e-mail dated May 19, 2010, plaintiff National Security Counselors ("NSC") submitted a FOIA request for an electronic copy of the MAOP and requested a fee waiver. (*See Exhibit A.*)

(6) This request was assigned FOIPA Request Number 1148707-000. The FBI denied NSC's request for a fee waiver.

(7) Although the FBI initially advised NSC that it would be required to pay \$15.00 for release of the MAOP on CD, the FBI subsequently determined that it maintained a pre-processed copy of the MAOP that it would provide free of charge.<sup>1</sup> Consequently, on June 11, 2010, the FBI released a copy of the MAOP to NSC on one CD.<sup>2</sup> The CD contained a copy of the MAOP from 1998 that had been previously processed in response to another request. **(See Exhibit B.)**

(8) By e-mail dated June 16, 2010, the FBI's Public Information Officer ("PIO") responded to a question from counsel for NSC about the quality of the version of the MAOP released on June 11<sup>th</sup>. The PIO advised that the quality was consistent with the version of the MAOP in the FBI's FOIA reading room but explained that he would check with RIDS's Work Process Unit to determine whether there was an updated version of the MAOP that was of better quality that could be provided to NSC. **(See Exhibit C.)**

(9) On June 17, 2010, the FBI released another copy of the MAOP to NSC on one CD. This CD contained a copy of the MAOP from 2007 that had been previously processed in response to another request. Because this was a pre-processed version of the MAOP, the FBI did not assess any fees for its release.<sup>3</sup> **(See Exhibit D.)**

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<sup>1</sup> The FBI was able to provide the pre-processed version free of charge because the cost to re-copy the document onto a CD and release it to NSC was minimal. In particular, the information security steps normally required to produce information to a requester had already been completed when the document was originally processed and released, and did not need to be repeated for this release. See ¶ 33(c) – (d) *infra*.

<sup>2</sup> The release letter was inadvertently dated July 11, 2010. It was actually mailed on or about June 11, 2010.

<sup>3</sup> As a non-commercial requester, NSC is entitled to the first 100 pages of duplication (or the cost equivalent) free of charge. See 28 C.F.R. § 16.11(d)(3)(i). Thus, while the FBI charges \$15.00 for release of records on a CD, we gave



(10) By e-mail dated June 22, 2010, counsel for NSC contacted the FBI's PIO concerning its release dated June 17, 2010, to verify that the version he had received was the most current version of the MAOP and to inquire about receiving a Table of Contents for that version. (See Exhibit E.)

(11) In a separate e-mail exchange on June 23, 2010, the FBI's PIO and NSC again corresponded about which version of the MAOP was released to plaintiff on June 17<sup>th</sup> and about receiving the Table of Contents. (See Exhibit F.)

(12) On February 8, 2011, the FBI provided NSC a copy of the MAOP's Table of Contents in its entirety under FOIPA Request Number 1148707-001.<sup>4</sup> Because this Table of Contents consisted of 49 pages and requesters are entitled to the first 100 pages of duplication for free pursuant to 28 C.F.R. § 16.11(d)(3)(i), no fees were charged for this release. (See Exhibit G.)

(13) Additionally, the FBI re-opened NSC's file to respond to its request for the most current version of the MAOP. By letters dated February 18, 2011, the FBI advised NSC that it had assigned the request FOIPA Request Number 1148707-002, and also that it had denied NSC's request for a fee waiver.<sup>5</sup> NSC was informed that it could appeal the FBI's fee waiver denial by filing an administrative appeal with the Department of Justice ("DOJ"), Office of Information

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Stein a \$10.00 credit to represent the 100 free pages to which he is entitled. Furthermore, the remaining \$5.00 he owed could not be recouped at that time because the minimum fee that can be charged is \$14.00. See 28 C.F.R. § 16.11(d)(4)-(5).

<sup>4</sup> When the MAOP from 2007 was previously processed, the Table of Contents was not included. Therefore, when the pre-processed version was provided to NSC, it did not include the Table of Contents.

<sup>5</sup> Because this version of the MAOP had not been previously processed, NSC's request was subject to the standard duplication charges associated with processing FOIA requests.

Policy ("OIP") within sixty (60) days. (*See Exhibit H.*)

(14) By letter dated February 24, 2011, the FBI advised NSC that it located approximately 2038 pages of material potentially responsive to its request for the most current version of the MAOP, and the FBI requested NSC's commitment to pay \$65.00 (for release on five CDs), within thirty days from the date of its letter. (*See Exhibit I.*)

(15) NSC did not respond to the FBI's request that it commit to pay the fees associated with the processing of its FOIA request and after waiting 30 days for a response, the FBI closed the request.

(16) By letter dated October 5, 2011, NSC submitted an appeal to OIP regarding the FBI's denial of its fee waiver request and the FBI's fee estimate/assessment.<sup>6</sup> (*See Exhibit J.*)

(17) By letter dated December 9, 2011, OIP acknowledged NSC's appeal and assigned it Appeal Number AP-2012-00784. (*See Exhibit K.*)

(18) By letter dated May 23, 2012, OIP affirmed the FBI's fee waiver denial and upheld the FBI's fee policy of charging \$15.00 per CD containing 500 pages of records. (*See Exhibit L.*)

(19) On April 24, 2013, plaintiffs NSC, Jeffrey Stein, and Truthout filed the present lawsuit. *See* Dkt. No. 1. Among other things, plaintiffs challenged the FBI's denial of a fee

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<sup>6</sup> I have learned in connection with this litigation that OIP apparently agreed to provide NSC an extension beyond 60 days to submit this appeal. The FBI was not notified of this extension. RIDS did not pull a copy of the MAOP as it existed in 2011 into its FOIA Document Processing System because the request for the manual was never perfected due to NSC's failure to respond within 30 days to the FBI's February 24, 2011 letter, and because the FBI did not receive any notice about an appeal being filed within 60 days (or about the extension that had been granted by OIP). The FBI's records show that we received notice of the appeal on or about December 9, 2011. Because the MAOP has been undergoing constant revision since March 2008 that has reduced the size of the document (as discussed in paragraph 21 below), an intact copy of the MAOP referenced in the February 24, 2011 letter no longer is accessible. *See* footnote 8 *infra*.

waiver request for NSC with respect to its request for the MAOP in FOIPA Request Number 1148707-002 and sought an order for the FBI to release a current version of the MAOP to NSC at no charge. *See* Dkt. No. 1 at ¶¶ 30 and 40 and footnote 1.<sup>7</sup>

(20) In an effort to narrow the issues in dispute in the pending lawsuit, the FBI processed and released the version of the MAOP as it existed on July 2, 2013 to NSC on a single CD at no charge. The FBI made this release on July 25, 2013. The FBI reviewed 495 pages<sup>8</sup> and released all of them in whole or in part.<sup>9</sup> (*See Exhibit M.*)

(21) The FBI has been reviewing and replacing the MAOP with Corporate Policy Office Directives and Policy Implementation Guides since March 2008. As new policy documents are approved, the appropriate sections of the MAOP are updated on the FBI's intranet, where the MAOP is maintained.<sup>10</sup> (*See Exhibit M.*) The replacement of the MAOP with Corporate Policy Office Directives and Policy Implementation Guides has reduced the size of the

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<sup>7</sup> Plaintiffs suggest that they would not challenge any withholdings the FBI made upon releasing a current version of the MAOP. *See* Dkt. No. 1 at footnote 1.

<sup>8</sup> The FBI initially estimated that the number of potentially responsive pages of the MAOP was 2038. *See* ¶ 14 *supra*. We have concluded that this initial estimate was inaccurate. RIDS obtained the numbers it used to reach that estimate from the intranet page where the MAOP is maintained. That page contained hyperlinks for the various parts of the MAOP, after which there was a number in parenthesis – *i.e.*, “Introduction (1)”; “Part I (1178)”; and “Part II (814).” RIDS concluded that these numbers represented the number of pages in each part of the MAOP. Adding these numbers together, and then adding the number of pages for the Table of Contents, RIDS arrived at the 2038 page estimate. The FBI has since concluded that the numbers in parentheses were outdated and had not been updated to reflect changes to the MAOP that have reduced its size. Thus, the FBI does not believe that the numbers in parentheses that were relied on in making the 2038 page estimate represented the actual number of pages in the MAOP at that time.

<sup>9</sup> A Table of Contents for the MAOP no longer exists, so the FBI produced an index listing all of the sections of the MAOP instead.

<sup>10</sup> The FBI is maintaining copies of the sections of the MAOP that have been superseded and replaced by Corporate Policy Office Directives and Policy Implementation Guides, but does not have an intact copy of the MAOP as it existed in 2011.

MAOP from approximately 1949 pages in the 2007 version of the MAOP (excluding the Table of Contents) to 495 pages in the version of the MAOP as it existed on July 2, 2013 that has been released to NSC.

(22) The FBI has determined that it is not required to pro-actively post the most up-to-date version of the MAOP in its electronic FOIA reading room – *i.e.*, *The Vault* – even though the FBI previously posted, at its discretion, a copy of the MAOP from 2007. First, the MAOP governs internal personnel matters (such as merit promotions, transfers, and disciplinary matters), resource management, training, and the like. Accordingly, the FBI has determined that it is not a staff manual that affects a member of the public. *See* 5 U.S.C. § 552(a)(2)(C). Second, the FBI has concluded that it is not a frequently requested record that must be posted pursuant to 5 U.S.C. § 552(a)(2)(D). The FBI traditionally does not receive a significant number of requests for the MAOP in any given year. For example, in FY2010, the FBI received two requests for the MAOP (including NSC’s request), and only one request for it in both FY2011 and FY2013. In FY2012, the FBI did not receive any requests for it. Considering that the FBI received more than 14,000 requests in each of these years, one or two requests for the MAOP per year is not “frequent.”<sup>11</sup>

#### **FBI’S ASSESSMENT OF FEES FOR RELEASES ON CDs**

##### **FOIPA Request Number 1148707-002**

(23) As explained in paragraphs 10 – 20 *supra.*, the FBI initially estimated that the

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<sup>11</sup> As explained in paragraph 21 *supra.*, the MAOP is undergoing regular and continuing revision. Consequently, the manual regularly changes and a single, static “version” does not exist from year-to-year. (Indeed, a single, static version often does not exist from quarter-to-quarter within a particular year.) Thus, the MAOP as it existed in FY2010 is not the same document that existed in FY2011 or FY2013, and the FBI accordingly considers the requests in FY2010, FY2011, and FY2013 to be requests for different documents rather than multiple requests for the same document.

version of the MAOP existing in February 2011 consisted of approximately 2038 pages and asked that NSC commit to pay \$65.00 for release on five CDs. (*See Exhibit I, supra.*) NSC did not commit to pay those fees and submitted an appeal to OIP, challenging the FBI's denial of its fee waiver request as well as the FBI's policy of charging \$15.00 per CD containing 500 pages. (*See Exhibit J, supra.*) OIP affirmed the FBI's denial of NSC's fee waiver request and upheld its fee policy regarding production of records on CDs. (*See Exhibit L, supra.*) Nevertheless, the FBI ultimately provided NSC a version of the MAOP current to July 2, 2013 at no charge. (*See Exhibit M, supra.*) In the end, the FBI released three versions of the MAOP to NSC, but did not charge NSC for any of those three copies. *See ¶¶ 7, 9, and 20 supra.*

**FOIPA Request Number 1173246**

(24) On or about September 13, 2011, plaintiff Jeffrey Stein ("Stein") submitted a FOIA request for "a copy of all pages on the internal FBI [Records Management Division] website..." and asked for a fee waiver. (*See Exhibit N.*)

(25) By letter dated September 15, 2011, the FBI acknowledged receipt of Stein's FOIA request and assigned it FOIPA Request Number 1173246-000. (*See Exhibit O.*)

(26) By letter dated September 27, 2012, the FBI made its first interim release to Stein. This release was on one CD and contained 567 pages of responsive material. The FBI did not charge Stein for this release.<sup>12</sup> The FBI also informed Stein that approximately 21,753 additional pages of responsive material had been identified and explained that, assuming all 21,753 pages

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<sup>12</sup> As a non-commercial requester, Stein is entitled to the first 100 pages of duplication (or the cost equivalent) free of charge. *See* 28 C.F.R. § 16.11(d)(3)(i). Thus, while the FBI charges \$15.00 for release of records on a CD, we gave Stein a \$10.00 credit to represent the 100 free pages to which he is entitled. Furthermore, the remaining \$5.00 he owed could not be recouped at that time because the minimum fee that can be charged is \$14.00. *See* 28 C.F.R. § 16.11(d)(4)-(5).

were released, he would owe \$2175.30 in duplication costs for paper copies or \$665.00 for production on CDs (*i.e.*, 44 CDs at \$15.00 apiece plus the \$5.00 owed from the first release as explained in footnote 12, *supra.*). The FBI denied Stein's request for a fee waiver and offered him the opportunity to reduce the scope of his request in order to reduce the fees associated with its processing. The FBI requested that Stein contact RIDS about narrowing the scope of his request or commit to paying the estimated fees within thirty days of the date of the September 27<sup>th</sup> letter. Finally, the FBI notified Stein of his right to file an administrative appeal with OIP. (*See Exhibit P.*)

(27) Stein did not contact RIDS to discuss narrowing the scope of his request, nor did he commit to paying the estimated fees. He also did not file an appeal with OIP regarding the FBI's fee waiver denial, assessment of fees, or any other matter related to the FBI's September 27<sup>th</sup> release. Because Stein did not respond to the September 27<sup>th</sup> letter within 30 days, the FBI closed this request.

**FOIPA Request Number 1197184**

(28) By e-mail dated May 22, 2012, Jason Leopold on behalf of Truthout ("Truthout") submitted a FOIA request for records concerning the "FBI's Campus Liaison Initiative." Truthout agreed to pay up to \$500.00 for the requested information. (*See Exhibit Q.*)

(29) By letter dated August 17, 2012, the FBI acknowledged receipt of Truthout's request, which it assigned FOIPA Request Number 1197184-000. In a separate letter dated August 17, 2012, the FBI advised Truthout that approximately 26,000 pages material responsive to its request had been located, and explained that, assuming all pages were released, duplication

costs for paper copies would be \$2590.00 and for CDs would be \$765.00 (*i.e.*, 52 CDs at \$15.00 apiece).<sup>13</sup> The FBI asked that Truthout commit to pay the estimated fees within 30 days of the date of letter. (*See Exhibit R.*)

(30) By letter dated September 7, 2012, Truthout submitted an appeal to OIP regarding the FBI's August 17, 2012 determination. In its appeal letter, Truthout committed to paying \$765.00 for release on CDs if its appeal was unsuccessful but reserved the right to seek judicial review if it did not prevail in its appeal of the FBI's fee determination. (*See Exhibit S.*)

(31) By letter dated September 26, 2012, OIP acknowledged Truthout's appeal and assigned it Appeal Number AP-2012-03398. (*See Exhibit T.*)

(32) By letter dated March 12, 2013, OIP advised Truthout that due to pending litigation, it was closing Appeal Number AP-2012-03398.<sup>14</sup> (*See Exhibit U.*)

**Explanation of the FBI's Policy Concerning Assessment of Fees for Releases on CDs**

(33) On or about January 2010, RIDS instituted a policy of processing and releasing 500 pages per CD for medium-queue and large-queue requests and charging \$15.00 per CD (hereinafter, the "policy"). The FBI's policy derives from and/or is the FBI's effort to comply with DOJ FOIA regulations at 28 C.F.R. § 16.5(b) (regarding the prompt disclosure of responsive material upon payment of any applicable fees); 28 C.F.R. § 16.6(b) (regarding notifications to requesters about fees associated with the processing of their requests); and 28 C.F.R. §

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<sup>13</sup> Both estimates included a \$10.00 discount for the first 100 pages of material (or cost equivalent). *See* 28 C.F.R. § 16.11(d)(3)(i).

<sup>14</sup> Plaintiffs' challenge to the FBI's fee policy regarding CDs was originally part of *Shapiro et al. v. DOJ*, Civ. No. 12-cv-1883 (D.D.C.) (BAH), which was filed in November 2012. The Court ordered that the allegations in that case be severed on April 17, 2013, after which plaintiffs filed this lawsuit.

16.11(c)(2) (regarding duplication fees for releases produced by computer). The rationale for the FBI's policy concerning assessment of fees for FOIA releases on CDs is four-fold:

(a) First, the policy is based on sound FOIA business practice. FOIA encourages agencies to develop multi-track processing with the goal of responding to more requests. Accordingly, RIDS established three processing queues—small (500 pages or less), medium (501-2,500 pages), and large (more than 2,500 pages). Within each queue, requests are processed in first-in, first-out (“FIFO”) order. By making interim releases in 500-page increments, RIDS regularly provides more pages to more requesters across the three queues, thus avoiding a system where a few, large queue requests monopolize finite processing resources resulting in less pages provided to fewer requesters on a more infrequent basis.

(b) Second, the policy promotes both RIDS and requester efficiencies. RIDS processes responsive records in 500-page increments, meaning that 500 pages are reviewed for release and once all security protocols are run, a CD is prepared; then the next 500 pages are reviewed and prepared for release; and so on until all responsive pages are reviewed and released. By working in 500-page increments, RIDS has found that more pages get processed, reviewed, and released to more requesters each month. In terms of managing work-flow, the interim releases can be assigned to multiple processors and the 500-page size has proven to be ideal for reviewing officials, subject matter experts, and other components or agencies that must be consulted before release. Moreover, maintaining a steady interim release posture is key to meeting the demands posed by the growing number, size, and complexity of FOIA/PA requests



received by the FBI.<sup>15</sup>

(c) Third, part of the process of finalizing material for release involves information security. Because many FBI records contain classified information, FBI FOIA/Privacy Act requests are processed on a classified computer network. Therefore, when a CD is prepared for release after review and consultation, it must also undergo a multi-step information security review. Specifically, the FBI employs a security software application (“Integrity”) that must be employed every time information is taken from the classified network and released to a requester in an unclassified format. This entails running a general security protocol, whereby Integrity scans for prescribed code words; and an individualized protocol, whereby Integrity scans for words that RIDS determines are unique to the particular request and may include searches for specific exempt words, names, confidential sources, or classified techniques. In this regard, the 500-page size has likewise proven ideal in maintaining a steady release flow. The running of these security protocols, and resolving any issues that may arise, can require a significant amount of effort and time that increases as more pages are added. Therefore, putting more pages on each CD would impose additional security protocol burdens and slow processing time.<sup>16</sup>

(d) Fourth, the policy promotes access as non-exempt information is processed

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<sup>15</sup> RIDS received 14,957 FOIA/PA requests in FY 2010; 15,335 requests in FY 2011; and 20,602 requests in FY 2012. RIDS processed 14,665 FOIA/PA requests in FY2010; 17,045 requests in FY2011; and 20,029 requests in FY2012. The average number of pages processed per request was 939 pages in FY2010; 1742 pages in FY 2011; and 1007 pages in FY2012.

<sup>16</sup> When a FOIA requester seeks a document that already has been processed and released in response to a prior request – such as NSC’s request for the 2007 MAOP – the already processed document does not need to be processed again on the classified network, which substantially reduces the costs to the FBI. *See* ¶ 33(d) *infra*. Thus, the 2007 MAOP was released to NSC without charge.

and released on a recurring basis contingent on payment, if applicable. Requesters benefit from the favorable cost structure. The FBI has not passed all of the direct costs of preparing a CD for release – including the cost of operator time – to requesters, although we are authorized to do so under 28 C.F.R. § 16.11(c)(2).<sup>17</sup> As explained above, all documents must be scanned through Integrity before they can be released. This scan is part of the duplication process by which the FBI moves records from its electronic FOIA Document Processing System onto CDs for release, for which the FBI can recoup all direct costs pursuant to 28 C.F.R. § 16.11(c)(2). The cost of running the Integrity protocols for a CD release alone exceeds the assessed \$15.00 per CD fee.<sup>18</sup> Moreover, the \$15.00 per CD cost is more favorable to the requester than the ten cents per page fee for paper photocopies.<sup>19</sup>

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<sup>17</sup> The cost for the CD itself is nominal.

<sup>18</sup> In the majority of instances, the RIDS employees who are responsible for setting up and running the Integrity scans range in grade from GS-11 to GS-13. Based on the 2013 Salary Table issued by the Office of Personnel Management for the Washington D.C. locality (in which RIDS is located), the minimum hourly salary for a RIDS employee running Integrity is \$29.93 per hour (GS-11, Step 1) and the maximum hourly salary for a RIDS employee running Integrity is \$55.46 per hour (GS-13/Step 10). See <http://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2013/general-schedule/washington-baltimore-northern-virginia-dc-md-va-wv-pa-hourlyovertime-rates-by-grade-and-step/>. In RIDS's experience, it generally takes approximately 50 minutes to set up and run the Integrity scan for 500 pages. Therefore, assuming that it takes 50 minutes to set up and run Integrity:

- The minimum operator cost for the Integrity process alone is \$24.50.
- The maximum operator cost for the Integrity process alone is \$46.00.
- The average operator cost for the Integrity process alone is \$39.50.

The amount of time it takes to set up and run Integrity increases as more pages are added that need to be scanned and/or as more search terms are added to the Integrity search protocol. Moreover, the costs listed above do not include the costs associated with re-running the scan after any corrections that need to be made.

<sup>19</sup> For example, if the response to a request consisted of 500 pages of material, then it would cost a non-commercial requester \$40.00 for paper copies. Non-commercial requesters are entitled to the first 100 pages of material at no cost. Thus, the requester in this example would be required to pay ten cents per page for 400 pages, or \$40.00. See 28 C.F.R. § 16.11(d)(3)(i). In contrast, under the FBI's CD fee policy, the requester in this example would not owe anything. Pursuant to DOJ's FOIA regulations, the minimum fee that can be collected is \$15.00. See 28 C.F.R. § 16.11(d)(4)-(5) (fees totaling \$14.00 or less cannot be recouped). The FBI provides a \$10.00 discount (the equivalent of 100 pages at ten cents per page) for the first CD, see 28 CFR § 16.11(d)(3), leaving a balance of only \$5.00, which

(34) All four of these factors work together jointly to form the basis for RIDS's policy.

(35) Plaintiffs have tried to avoid having to pay for more than one CD by instructing the FBI not to make interim releases and to instead make only one release once all responsive records have been processed. As noted in paragraph 33, however, the practice of making interim releases not only benefits requesters, but is also an efficient way for RIDS to manage its significant workload. The FBI has determined that altering its policy to suit the personal preferences of plaintiffs or any of the thousands of other requesters seeking information from the FBI would not be feasible or efficient and would disrupt RIDS' ability to process the high volume of requests that are received in a manner that is most beneficial for FOIA requesters as a whole.

#### CONCLUSION

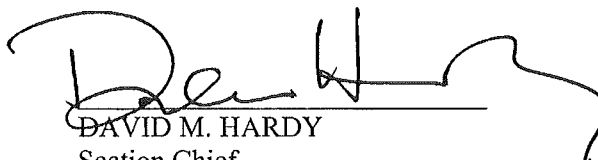
(36) As described above, the FBI has fulfilled NSC's request for a current version of the MAOP by releasing a copy of the manual current as of July 2, 2013 on one CD free of charge. Furthermore, the FBI's policy of charging \$15.00 per CD containing 500 pages of records is an appropriate and reasonable assessment of duplication fees, and is consistent with the FOIA, 5 U.S.C. § 552(a)(4)(A)(ii) and DOJ's FOIA fee regulation at 28 C.F.R. § 16.11.

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is below the minimum that the FBI can recoup. If we increase the number of responsive pages in this example to 1000, then the requester would owe \$90.00 for paper copies but only \$20.00 to receive the records on CD (the \$5.00 balance for the first CD and \$15.00 for the second CD).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, and that Exhibits A through U attached hereto are true and correct copies.

Executed this 17<sup>th</sup> day of September, 2013.

A handwritten signature in black ink, appearing to read "D. Hardy", is written over a horizontal line.

DAVID M. HARDY

Section Chief

Record/Information Dissemination Section

Records Management Division

Federal Bureau of Investigation

Winchester, Virginia

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

<hr/>		)	
NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
Plaintiffs,		)	
v.		)	Civ. A. No. 1:13-cv-00556-RC
DEPARTMENT OF JUSTICE,		)	
Defendant.		)	
<hr/>		)	

EXHIBIT A

**Sobonya, David P.**

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**From:** Kel McClanahan, Esq. [kel@nationalsecuritylaw.org]  
**Sent:** Wednesday, May 19, 2010 2:45 AM  
**To:** FOIPA\_Request  
**Subject:** Form Returned: efoia.pdf  
**Attachments:** efoia.pdf

Form Returned: efoia.pdf

The attached file is the filled-out form. Please open it to review the data.

5/19/2010

OS-2018-000959-01041

### **FBI eFOIA Request Form**

#### **Instructions:**

- 1) Please use this form only to request information about an organization, a business, an investigation, a historical event, an incident, or a group. **This form should not be used to submit Privacy Act requests for information about yourself or another living person.**
- 2) Required fields are marked. If you do not enter accurate and complete information, we may not be able to process your request.
- 3) After filling out the information, submit your request electronically by clicking the SUBMIT button at the bottom of the page. Please note: This is not a secure form, and we cannot guarantee the confidentiality of communications sent via the Internet.
- 4) You also have the option of typing your information into this form, printing it, and: (1) faxing it to (540) 868-4995/4996/4997; or (2) mailing it to **FBI, FOI/PA Request, Record/Information Dissemination Section, 170 Marcel Drive, Winchester, VA 22602-4843**. You can also e-mail the information to [foiparequest@ic.fbi.gov](mailto:foiparequest@ic.fbi.gov).
- 5) For more information on how to prepare and submit your request, please call the FOIA Requestor Service Center at (540) 868-1535 or see the Requesting FBI Records webpage: [http://foia.fbi.gov/requesting\\_records.html](http://foia.fbi.gov/requesting_records.html)

**Dear FOIA Officer:**

This is a request filed under the Freedom of Information Act.

#### **Reasonably Describe the Records**

Describe the records you are requesting. Be as specific as possible with regard to names, dates, places, events, subjects, etc. Please include any known file designations or descriptions for the records you seek.

Bear in mind that the FBI was not established until 1908 and has very few records prior to the 1920s. The Freedom of Information Act clearly states that records must exist at the time the request is submitted to be considered.

**Enter description:** You must submit a separate request for each subject: (Required)  
Describe Subject/Incident of Request. Give Time Frame (if applicable).

An electronic copy of the MAOP

**Type of Requestor**

Please provide information about yourself and the purpose of your request to help us determine your fee category: (Required)

Non-profit national security law education and legal aid organization

**Fees and Fee Waivers**

Your request must include a statement that:

- (1) You agree to pay any fees that may be incurred to process the request;
- (2) Stipulates an amount you are willing to pay; or
- (3) Requests a specific waiver or reduction of fees.

Please select the statement that applies: (Required)

I agree to pay all applicable fees. ☐

I agree to pay up to a specific amount for fees. ☐ (Enter dollar amount)

I request a waiver or reduction of fees. ☒

Explanation for request of waiver or reduction of fees:

Will make the MAOP publicly available on our website for free download

**Expedited Processing**

If you are seeking expedited processing, please choose one of the options below and provide a justification.

I believe a compelling need exists to warrant expedited processing because there is an imminent threat to the life or physical safety of an individual. ☐

I believe a compelling need exists to warrant expedited processing because there is an urgency to inform the public concerning actual or alleged federal government activity (Note: This option is available ONLY for requestors primarily engaged in disseminating information). ☐

Please provide your specific justification for expedited processing:



Thank you for your consideration of my request.

Sincerely,

Title: (Mr. Mrs. Miss, etc.) Mr.

Name: (Required) Kel McClanahan

Organization: (Required if applicable)

National Security Counselors

Street Address: (Required)

1200 S Courthouse Rd Suite 124

City: (Required) Arlington

State: (Required if applicable) VA

Or Country: (Required if applicable) USA

ZIP or Postal Code: (Required) 22204

Phone #1: 301-728-5908

Phone #2:

Fax Number:

E-mail address: kel@nationalsecuritylaw.org

Secondary address:

**Submit**

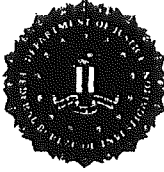
**Print Page**

**Clear Information**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

<hr/>		)	
NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
		)	
Plaintiffs,		)	
		)	
v.		)	Civ. A. No. 1:13-cv-00556-RC
		)	
DEPARTMENT OF JUSTICE,		)	
		)	
Defendant.		)	
<hr/>		)	

EXHIBIT B



U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535

July 11, 2010

*June*

MR. KEL MCCLANAHAN  
NATIONAL SECURITY COUNSELORS  
SUITE 124  
1200 SOUTH COURTHOUSE ROAD  
ARLINGTON, VA 22204

FOIPA Request No.: 1148707- 000  
Subject: MAOP

Dear Mr. McClanahan:

The records that you have requested were previously processed under the provisions of the Freedom of Information Act for another requester.

Enclosed is 1 CD pertaining to your request and a copy of the explanation of exemptions.

You may file an appeal by writing to the Director, Office of Information Policy (OIP), U.S. Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-0001. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIPA Request Number assigned to your request so that it may be identified easily.

Very truly yours,

A handwritten signature in black ink, appearing to read "D. Hardy", is written over the typed name.

David M. Hardy  
Section Chief,  
Record/Information  
Dissemination Section  
Records Management Division

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. A. No. 1:13-cv-00556-RC
	)	
DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	

EXHIBIT C

immediately by telephone or email and purge the original and all copies thereof. Thank you.

Kel McClanahan, Esq.  
Executive Director  
National Security Counselors

"As a general rule, the most successful man in life is the man who has the best information."  
Benjamin Disraeli, 1880

"Quis custodiet ipsos custodes?" ("Who watches the watchers?")  
Juvenal, Satire VI

----- Original Message -----

**From:** Sobonya, David P.  
**To:** Kel McClanahan, Esq.  
**Sent:** Wednesday, June 16, 2010 2:26 PM  
**Subject:** RE: FOIA req 1148707-000

Dear Mr. McClanahan,

I personally checked the Reading Room CD of the MAOP and I believe the quality reflects your version. I can have another copy made for you but I believe that the quality will be the same. I will check with the Work Process Unit to determine if an updated version can be made of the documents to improve the quality.

If you require additional assistance please contact me.

Thank you,

**David P. Sobonya**  
**Public Information Officer/Legal Admin. Specialist**  
**Service Request Unit (SRU)**  
**Record/Information Dissemination Section (RIDS)**  
**FBI-Records Management Division**  
**170 Marcel Drive, Winchester, VA 22602-4843**  
**Office: (540) 868-4286**  
**Fax: (540) 868-4995 or 4997**

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**From:** Kel McClanahan, Esq. [mailto:kel@nationalsecuritylaw.org]  
**Sent:** Wednesday, June 16, 2010 10:42 AM  
**To:** Sobonya, David P.  
**Subject:** FOIA req 1148707-000

David,

I just received a CD in response to this FOIA request for a copy of the MAOP. However, I am surprised at the document. This appears to be a bad scan of an old document. Please confirm that this is a) the most current edition of the MAOP and b) the best copy available. With regard to this second part, I would be very surprised if there were not a digital copy (or at least a clean copy available for scanning) in existence of such a ubiquitous and important manual as the MAOP. It seems highly unlikely that a poorly scanned hardcopy document is the BEST version of this manual.

Thanks,

Kel

12/15/2010

OS-2018-000959-01048

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
		)	
Plaintiffs,		)	
		)	
v.		)	Civ. A. No. 1:13-cv-00556-RC
		)	
DEPARTMENT OF JUSTICE,		)	
		)	
Defendant.		)	
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EXHIBIT D



U.S. Department of Justice

Federal Bureau of Investigation  
Washington, D.C. 20535

June 17, 2010

MR. KEL MCCLANAHAN  
NATIONAL SECURITY COUNSELORS  
SUITE 124  
1200 SOUTH COURTHOUSE ROAD  
ARLINGTON, VA 22204

FOIPA Request No.: 1148707- 000  
Subject: MAOP

Dear Mr. McClanahan:

The records that you have requested were previously processed under the provisions of the Freedom of Information Act for another requester.

Enclosed is 1 CD pertaining to your request and a copy of the explanation of exemptions.

You may file an appeal by writing to the Director, Office of Information Policy (OIP), U.S. Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-0001. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIPA Request Number assigned to your request so that it may be identified easily.

Very truly yours,

A handwritten signature in black ink, appearing to read "D. Hardy", is written over a horizontal line.

David M. Hardy  
Section Chief,  
Record/Information  
Dissemination Section  
Records Management Division

Enclosure(s)

# EXPLANATION OF EXEMPTIONS

## SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552

- (b)(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified to such Executive order;
- (b)(2) related solely to the internal personnel rules and practices of an agency;
- (b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ( A ) could be reasonably be expected to interfere with enforcement proceedings, ( B ) would deprive a person of a right to a fair trial or an impartial adjudication, ( C ) could be reasonably expected to constitute an unwarranted invasion of personal privacy, ( D ) could reasonably be expected to disclose the identity of confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, ( E ) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or ( F ) could reasonably be expected to endanger the life or physical safety of any individual;
- (b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (b)(9) geological and geophysical information and data, including maps, concerning wells.

## SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a

- (d)(5) information compiled in reasonable anticipation of a civil action proceeding;
- (j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;
- (k)(1) information which is currently and properly classified pursuant to an Executive order in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;
- (k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;
- (k)(4) required by statute to be maintained and used solely as statistical records;
- (k)(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service the release of which would compromise the testing or examination process;
- (k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his/her identity would be held in confidence.

FBI/DOJ



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,	)	)	
	)	)	
Plaintiffs,	)	)	
	)	)	
v.	)	)	Civ. A. No. 1:13-cv-00556-RC
	)	)	
DEPARTMENT OF JUSTICE,	)	)	
	)	)	
Defendant.	)	)	
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EXHIBIT E

**Sobonya, David P.**

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**From:** Kel McClanahan, Esq. [kel@nationalsecuritylaw.org]  
**Sent:** Tuesday, June 22, 2010 6:39 PM  
**To:** Sobonya, David P.  
**Subject:** Re: FOIA req 1148707-000

Thank you, I just received a new CD with what appears to be a 2007 printout of the most-recent-at-that-time edition. If that is in fact the current edition of the MAOP (i.e. if the current edition of the MAOP was written before 1/31/07), then this is exactly what I need, except that there was no Table of Contents on the CD like there was for the previous edition. Could you just email me the TOC (rather than wasting another CD), and confirm that this January 2007 edition is the current edition?

Thanks,  
Kel

---  
This electronic mail (email) transmission is meant solely for the person(s) to whom it is addressed. It contains confidential information that may also be legally privileged. Any copying, dissemination or distribution of the contents of this email by anyone other than the addressee or his or her agent for such purposes is strictly prohibited. If you have received this email in error, please notify me immediately by telephone or email and purge the original and all copies thereof. Thank you.

Kel McClanahan, Esq.  
Executive Director  
National Security Counselors

"As a general rule, the most successful man in life is the man who has the best information."  
Benjamin Disraeli, 1880

"Quis custodiet ipsos custodes?" ("Who watches the watchers?")  
Juvenal, Satire VI

----- Original Message -----

**From:** Sobonya, David P.  
**To:** Kel McClanahan, Esq.  
**Sent:** Wednesday, June 16, 2010 2:26 PM  
**Subject:** RE: FOIA req 1148707-000

Dear Mr. McClanahan,

I personally checked the Reading Room CD of the MAOP and I believe the quality reflects your version. I can have another copy made for you but I believe that the quality will be the same. I will check with the Work Process Unit to determine if an updated version can be made of the documents to improve the quality.

If you require additional assistance please contact me.

Thank you,

**David P. Sobonya**  
**Public Information Officer/Legal Admin. Specialist**  
**Service Request Unit (SRU)**  
**Record/Information Dissemination Section (RIDS)**  
**FBI-Records Management Division**

12/15/2010

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
		)	
Plaintiffs,		)	
		)	
v.		)	Civ. A. No. 1:13-cv-00556-RC
		)	
DEPARTMENT OF JUSTICE,		)	
		)	
Defendant.		)	
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EXHIBIT F

**Sobonya, David P.**

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**From:** Kel McClanahan, Esq. [kel@nationalsecuritylaw.org]

**Sent:** Wednesday, June 23, 2010 3:23 PM

**To:** Sobonya, David P.

**Subject:** Re: FOIA req 1148707-000

I don't understand. My original request was for a complete current version of the MAOP, which your reading room says is available on CD. I didn't ask for the 1998 version, nor did I ask for the 2007 version, nor did I ask for "whatever versions have been previously released under FOIA." I asked for the current version the first time, and your reading room says that the current version is available on request. Your Work Process Unit took the shortcuts of sending me only those versions that were previously released under FOIA, but that *wasn't* what I asked for. Please send me a *full* (including TOC) *current* version of the MAOP, as your reading room says that you have available on request, and tell the Work Process Unit to stop sending me only those things that have been previously processed. This is not a new request, this is me reiterating what I asked for originally.

---  
This electronic mail (email) transmission is meant solely for the person(s) to whom it is addressed. It contains confidential information that may also be legally privileged. Any copying, dissemination or distribution of the contents of this email by anyone other than the addressee or his or her agent for such purposes is strictly prohibited. If you have received this email in error, please notify me immediately by telephone or email and purge the original and all copies thereof. Thank you.

Kel McClanahan, Esq.  
Executive Director  
National Security Counselors

"As a general rule, the most successful man in life is the man who has the best information."  
Benjamin Disraeli, 1880

"Quis custodiet ipsos custodes?" ("Who watches the watchers?")  
Juvenal, Satire VI

----- Original Message -----

**From:** Sobonya, David P.

**To:** Kel McClanahan, Esq.

**Sent:** Wednesday, June 23, 2010 3:16 PM

**Subject:** RE: FOIA req 1148707-000

Dear Mr. McClanahan,

According to the release letter on the previous FOIA request (b)(3) was used for Part II, 10-17.12.2 (Reporting Information From Other Government Agencies) and subsection (4) not (3), lists the National Security Act of 1947 and the CIA Act of 1949.

The Index for the MAOP which you have was processed under FOIA but not the Table of Contents. If you wish to submit a request for the MAOP's TABLE OF CONTENTS please let me know because I cannot simply e-mail you a copy?

I believe some revisions were made in 2008 and you can submit a new request for any updated versions if you wish?

Please let me know if you require additional assistance?

Thanks,

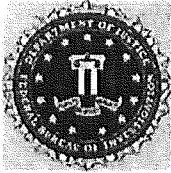
12/15/2010

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
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Plaintiffs,		)	
		)	
v.		)	Civ. A. No. 1:13-cv-00556-RC
		)	
DEPARTMENT OF JUSTICE,		)	
		)	
Defendant.		)	
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EXHIBIT G

U.S. Department of Justice



Federal Bureau of Investigation

Washington, D.C. 20535

February 8, 2011

MR. KEL MCCLANAHAN  
NATIONAL SECURITY COUNSELORS  
SUITE 124  
1200 SOUTH COURTHOUSE ROAD  
ARLINGTON, VA 22204

FOIPA Request No.: 1148707- 001  
Subject: MAOP

Dear Mr. McClanahan:

This is in response to your Freedom of Information Act (FOIA) request concerning the above subject.

The material responsive to your request was reviewed under the provisions of the Freedom of Information Act, Title 5, Section 552 and is being released to you in its entirety.

If you desire, you may appeal any denials contained herein by writing the Director, Office of Information and Privacy (OIP), United States Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, D. C. 20530-001. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIPA Number assigned to your request so that it may be easily identified.

This completes the processing of your FOIA request by the FBI.

A handwritten signature in black ink, appearing to read "David Hardy", is positioned above the closing text.

Very truly yours,

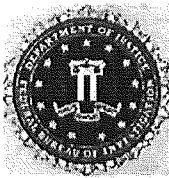
David M. Hardy  
Section Chief  
Record/Information  
Dissemination Section  
Records Management Division

Enclosure(s)

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
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Plaintiffs,		)	
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v.		)	Civ. A. No. 1:13-cv-00556-RC
		)	
DEPARTMENT OF JUSTICE,		)	
		)	
Defendant.		)	
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EXHIBIT H



U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535

February 18, 2011

MR. KEL MCCLANAHAN  
NATIONAL SECURITY COUNSELORS  
SUITE 124  
1200 SOUTH COURTHOUSE ROAD  
ARLINGTON, VA 22204

FOIPA Request No. 1148707- 002  
Subject: MAOP

Dear Mr. McClanahan:

This is in response to your request for a fee waiver for the above referenced Freedom of Information-Privacy Acts (FOIPA) request. Requests for fee waivers are determined on a case by case basis. See 5 U.S.C. § 552 (a)(4)(A)(iii).

In order to be granted a fee waiver or a reduction in fees, two requirements must be satisfied. First, it must be established that "disclosure of the [requested] information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." Second, it must be established that "disclosure of the information . . . is not primarily in the commercial interest of the requester." See 5 U.S.C. § 552(a)(4)(A)(iii). The burden is on the requester to show the statutory requirements for a fee waiver have been met. Where one or both of these requirements has not been satisfied, a fee waiver is not warranted under the statute.

To determine whether the first requirement has been met, we consider the following four factors: (1) whether the subject of the requested records concerns "the operations or activities of the government;" (2) whether the disclosure is "likely to contribute" to an understanding of government operations or activities; (3) whether disclosure of the requested information will contribute to "public understanding;" and (4) whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. See 28 C.F.R. § 16.11(k)(2).

If the first requirement has been met, we are then required to determine whether disclosure of the requested information is primarily in the commercial interest of the requester. To make this determination, we consider the following two factors: (1) whether the requester has a commercial interest that would be furthered by the requested disclosure and (2) whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester." See 28 C.F.R. § 16.11(k)(3). If the requester's commercial interest in disclosure is greater than the public interest to be served, then a fee waiver is not warranted.

We have reviewed the information that you provided in support of your request for a fee waiver and have found that you do not satisfy either requirement. Simply making a request for a fee waiver without also providing factual details or support specific to your request, is not sufficient under the law. Consequently, your request is denied.

You may appeal this denial by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, D.C., 20530-0001. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal." Please cite the FOIPA number assigned to your request to facilitate its identification.

Sincerely yours,

A handwritten signature in black ink, appearing to read "David Hardy", is written over a horizontal line.

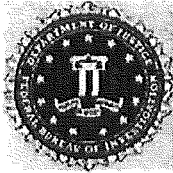
David M. Hardy

Section Chief,  
Record/Information  
Dissemination Section  
Records Management Division

OS-2018-000959-01059



U.S. Department of Justice



Federal Bureau of Investigation

Washington, D.C. 20535

February 18, 2011

MR. KEL MCCLANAHAN  
NATIONAL SECURITY COUNSELORS  
SUITE 124  
1200 SOUTH COURTHOUSE ROAD  
ARLINGTON, VA 22204

FOIPA Request No.: 1148707- 002  
Subject: MAOP

Dear Mr. McClanahan:

- ☒ This acknowledges receipt of your Freedom of Information-Privacy Acts (FOIPA) request to the FBI. The FOIPA number listed above has been assigned to your request.
- ☐ For an accurate search of our records, please provide the complete name, alias, date and place of birth for the subject of your request. Any other specific data you could provide such as prior addresses, or employment information would also be helpful. If your subject is deceased, please include date and proof of death.
- ☐ To make sure information about you is not released to someone else, we require your notarized signature or, in place of a notarized signature, a declaration pursuant 28 U.S.C. § 1746. For your convenience, the reverse side of this letter contains a form which may be used for this purpose.
- ☐ If you want the FBI's Criminal Justice Information System (CJIS) to perform a search for your arrest record, please follow the enclosed instructions in Attorney General Order 556-73. You must submit fingerprint impressions so a comparison can be made with the records kept by CJIS. This is to make sure your information is not released to an unauthorized person.
- ☒ We are searching the indices to our Central Records System for the information you requested, and will inform you of the results as soon as possible.
- ☐ Processing delays have been caused by the large number of requests received by the FBI. We will process your request(s) as soon as possible.

Your request has been assigned the number indicated above. Please use this number in all correspondence with us. Your patience is appreciated.

A handwritten signature in black ink, appearing to be "D. A. B.", is located below the text "Very truly yours,".

Very truly yours,

Dissemination Section

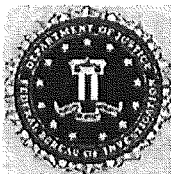
David M. Hardy  
Section Chief,  
Record/Information  
Records Management Division

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
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Plaintiffs,		)	
		)	
v.		)	Civ. A. No. 1:13-cv-00556-RC
		)	
DEPARTMENT OF JUSTICE,		)	
		)	
Defendant.		)	
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EXHIBIT I

U.S. Department of Justice



Federal Bureau of Investigation

Washington, D.C. 20535  
February 24, 2011

MR. KEL MCCLANAHAN  
NATIONAL SECURITY COUNSELORS  
SUITE 124  
1200 SOUTH COURTHOUSE ROAD  
ARLINGTON, VA 22204

FOIPA Request No.: 1148707- 002  
Subject: MAOP

Dear Mr. McClanahan:

This is in reference to your Freedom of Information-Privacy Acts (FOIPA) request.

We have located approximately 2038 pages which are potentially responsive to your request. Releases are available on CD upon request. Each CD contains approximately 500 pages per release. The 500 page estimate is based on our business practice of processing medium and large track cases through interim releases that generally equal approximately 500 pages. The first 100 pages of duplication, or the cost equivalent (\$10.00) for releases on CD, will be provided to you at no charge. In accordance with the DOJ regulations, the FBI notifies requesters when anticipated fees exceed \$25.00. If all of the pages that are potentially responsive to your request are released, you will owe \$65.00 (5 CD's at \$15.00 less \$10.00) to receive the release on a CD. Please remember this is only an estimate, and if some of the pages are withheld in full pursuant to FOIA/Privacy Act exemption(s) or are determined to not be responsive to your request, the actual charges could be less.

To accelerate the processing of your request, you may wish to consider reducing the scope of your request so that it will fall within one of the smaller queues. This may allow you to lower your search and duplication costs and hasten the receipt of your information. The FBI uses a three-queue system as a way to fairly assign and process new requests. The placement of a request in one of the three queues depends on the total number of pages responsive to that request - 500 pages or less (small queue), 501 pages to 2500 pages (medium queue), or more than 2500 pages (large queue). The small queue has the fastest rate of processing. Please let us know in writing if you are interested in discussing the possibility of reducing the scope of your request, as well as your willingness to pay the estimated search and duplication costs indicated in the above paragraph. Your written response should provide a telephone number where you can be reached between the hours of 8:00 a.m. and 5:00 p.m., EST, if one is available. Please send this response to: Work Process Unit, Record Information/Dissemination Section, Records Management Division, Federal Bureau of Investigation, 170 Marcel Drive, Winchester, VA 22602. You may also fax your response to the following number: 540-868-4997, Attention: Work Process Unit.

**No payment is required at this time.** However, you must notify us in writing within thirty (30) days from the date of this letter of your commitment to pay the estimated fee. If we do not receive your commitment to pay within thirty (30) days of the date of this notification, your request will be closed. Please include the FOIPA Request Number listed above in any communication regarding this matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "D. Hardy", is located below the "Sincerely yours," text.

David M. Hardy  
Section Chief,  
Record/Information  
Dissemination Section  
Records Management Division

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
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Plaintiffs,		)	
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v.		)	Civ. A. No. 1:13-cv-00556-RC
		)	
DEPARTMENT OF JUSTICE,		)	
		)	
Defendant.		)	
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EXHIBIT J

## NATIONAL SECURITY COUNSELORS

1200 SOUTH COURTHOUSE ROAD  
SUITE 124  
ARLINGTON, VA 22204

TELEPHONE: (301) 728-5908  
FACSIMILE: (240) 681-2189

KEL MCCLANAHAN, ESQ., EXECUTIVE DIRECTOR (admitted in NY, DC)  
EMAIL: KEL@NATIONALSECURITYLAW.ORG

BRADLEY P. MOSS, ESQ., DEPUTY EXECUTIVE DIRECTOR (admitted in IL, DC)  
EMAIL: BRAD@NATIONALSECURITYLAW.ORG

RECEIVED

5 October 2011

OCT 05 2011

Office of Information Policy

Melanie Ann Pustay  
Director  
Office of Information Policy  
U.S. Department of Justice  
1425 New York Avenue, NW  
Suite 11050  
Washington, DC 20530-0001

Re: FBI FOIA Request #1148707-002

Dear Ms. Pustay:

I have received David Hardy's letters dated 18 February and 24 February 2011 regarding the above indicated FOIA request for a copy of the **current Manual of Administrative Operations and Procedures ("MAOP")**. In these letters, Mr. Hardy denied our request for a public interest fee waiver and stated that the FBI would only release the record on five CDs, charging us a total of \$65. I am writing to appeal both of these decisions.

As an initial matter, this appeal is tardy because I have been waiting on a response from Janice McLeod to a set of inquiries about the latter practice sent on 4 May 2011, and I have not yet received an answer. On 24 March 2011, because this appeal related directly to a then-pending appeal (AP-2011-00113), Ms. McLeod initially gave me an extension of the appeal deadline until an appeal decision was made in that appeal. After she made a determination in AP-2011-00113 on 22 April 2011, I requested clarification from Ms. McLeod about some of the points in her response letter on 4 May 2011, and asked for a further extension of this appeal deadline until she had answered the questions. Ms. McLeod did not formally give me such permission, but after she asked me for more details about the initial extension, which I provided, she thanked me and did not deny the request. From this exchange and our past interactions, I assumed that she consented to this extension. However, as five months have now passed without a response to my inquiries, I feel it is time to submit my appeal and get the review process started.

As a bit of background for this request, this is now the third iteration of a straightforward request made in May 2010 for a current copy of the MAOP. In May 2010, the FBI's Electronic Reading Room included a link for the MAOP but stated "for a copy, file a FOIA request." We

accordingly did so on 19 May 2010, requesting an electronic copy of the current MAOP and a fee waiver, since the record was supposed to be available in the FBI reading room. The FBI assigned this Request No. 1148707-000 on 27 May 2010, denied our fee waiver request, and informed us that a CD would cost \$15. I appealed the decision to the Public Liaison, Dennis Argall, on 3 June 2010, and on 11 June 2010 we received a CD with a poor-quality scan of the 1998 edition of the MAOP. not

On 16 June 2010, I emailed Dave Sobonya, the official FBI point of contact, asking if the 1998 edition was the current edition, reminding him that we had requested the current edition. On 17 June 2010, we received another CD, this time with the 2007 edition, but with no table of contents. On 22 June 2010, I emailed Dave Sobonya again, asking if the 2007 edition was the current edition, and asking for the table of contents, reminding him again that we had requested the complete current edition. On 23 June 2010, Dave Sobonya replied, stating that there had been modifications since the 2007 edition, but that we would have to file a new FOIA request for the current edition and the table of contents. I replied, stating that our initial request had been for those documents, and the FBI had sent us previous editions of their own volition.

On 27 July 2010, Dennis Argall emailed me, stating that the FBI would process the request for the current edition, including the table of contents and all supplements. On 8 February 2011, we received a paper copy of the table of contents of the current MAOP and a letter stating that the request (now #1148707-001) was being closed. On 11 February and 15 February 2011, I emailed Dennis Argall, reminding him that the request couldn't be closed until the current edition was processed (not just the table of contents), and that we had requested electronic records.

On 18 February 2011, I received a letter informing me that the FBI had opened yet *another* request for the current edition in its entirety, this time assigning it Request No. 1148707-002. This letter (the subject of the current appeal) once again denied our request for a fee waiver, and on 24 February 2011, the FBI informed us in another letter (also the subject of the current appeal) that because the MAOP is 2038 pages long, the FBI would only release it in approximately 500-page chunks across five CDs, charging us \$65 (\$75 minus \$10, which would be the duplication cost of 100 pages). That day, I emailed Dennis Argall, asking him to fix the fee waiver issue (which would moot the CD issue), in light of the fact that we were given a fee waiver the first time around and all the subsequent releases had been bureaucratic errors. On 25 February 2011, Dennis Argall responded, stating rather strangely that we had never been given a fee waiver.

### ***Public Interest Fee Waiver***

Our reasons for asking for a public interest fee waiver are the same now as they were in May 2010. The MAOP meets the requirements of both subsections (a)(2)(B) and (D) of FOIA requiring that it be made publicly available. The mere fact that the FBI made a mention of it in its 2010 reading room and includes the 2007 edition (minus the table of contents) in its current reading room is itself evidence that the FBI believes that this record is of public interest. The FBI's assertion that it can somehow satisfy its proactive disclosure requirement by publishing an old edition is legally unsound, and its corollary assertion that the public interest would not be

served by NSC publishing the current edition *for it* is nonsensical. That the FBI saw fit to release responsive records no less than three times in response to this request without charging NSC before irrationally refusing to provide a final response (which was the response requested the entire time) without payment only serves to highlight the unreasonableness of the FBI's position.

***500 Pages Per CD***

According to the FBI, this practice is the result of its desire to provide interim releases to requesters, but in a situation such as this one it results in an absurd result. The document which the FBI claims *must* be split between five separate CDs is *one single document*. No reasonable person would expect interim releases of parts of *one record*. We have repeatedly informed the FBI that we waive our right to interim responses, thereby allowing the FBI to make one release on one CD when it has completed its review, but the FBI still insists that it cannot release more than approximately 500 pages on a single CD. This practice is a textbook example of the type of "unnecessary bureaucratic hurdles" that Attorney General Holder proclaimed have no place in the current era of open government. As such, even if our fee waiver request is denied, the FBI should be made to follow our clear directions and release the entire current MAOP on one CD, which according to FBI guidelines is to be provided free of charge.<sup>1</sup>

Your cooperation in this matter would be appreciated. If you wish to discuss this appeal, please do not hesitate to contact me.

Sincerely,



Kel McClanahan —  
Executive Director

---

<sup>1</sup> This release should be considered to be the "first CD" released to NSC, since all previous releases were non-responsive to our request and were the sole result of the FBI's bureaucratic mistakes.



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,	)	)	
	)	)	
Plaintiffs,	)	)	
	)	)	
v.	)	)	Civ. A. No. 1:13-cv-00556-RC
	)	)	
DEPARTMENT OF JUSTICE,	)	)	
	)	)	
Defendant.	)	)	
<hr/>		)	

EXHIBIT K



U.S. Department of Justice

Office of Information Policy

Telephone: (202) 514-3642

Washington, D.C. 20530

DEC 09 2011

Kel McClanahan, Esq.  
National Security Counselors  
Suite 124  
1200 South Courthouse Road  
Arlington, VA 22204

Re: Request No. 1148707-002

Dear Mr. McClanahan:

This is to advise you that your administrative appeal from the action of the Federal Bureau of Investigation was received by this Office on October 5, 2011.

The Office of Information Policy has the responsibility of adjudicating such appeals. In an attempt to afford each appellant equal and impartial treatment, we have adopted a general practice of assigning appeals in the approximate order of receipt. Your appeal has been assigned number **AP-2012-00784**. Please mention this number in any future correspondence to this Office regarding this matter.

We will notify you of the decision on your appeal as soon as we can. If you have any questions about the status of your appeal you may contact me at the number above.

Sincerely,

A handwritten signature in black ink, appearing to read "Priscilla Jones", written over a horizontal line.

Priscilla Jones  
Supervisory Administrative Specialist

FILE

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

<hr/>		)	
NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
		)	
Plaintiffs,		)	
		)	
v.		)	Civ. A. No. 1:13-cv-00556-RC
		)	
DEPARTMENT OF JUSTICE,		)	
		)	
Defendant.		)	
<hr/>		)	

EXHIBIT L



U.S. Department of Justice  
Office of Information Policy  
Suite 11050  
1425 New York Avenue, NW  
Washington, DC 20530-0001

Telephone: (202) 514-3642

MAY 23 2012

Kel McClanahan, Esq.  
National Security Counselors  
Suite 124  
1200 South Courthouse Road  
Arlington, VA 22204

Re: Appeal No. AP-2012-00784  
Request No. 1148707-002  
JGM:MWH

Dear Mr. McClanahan:

You appealed from the action of the Federal Bureau of Investigation on your request for access to the current Manual of Administrative Operations and Procedures (MAOP). Specifically, you appealed the FBI's denial of your public interest fee waiver request as well as the FBI's estimate of reproduction fees.

As you know, by e-mail dated March 23, 2011, you asked me for an extension of time to appeal the above-referenced FBI FOI/PA request until I had issued a decision on your appeal AP-2011- 00113; I indicated "yes, in this instance" but encouraged you to instead submit an appeal by simply stating in writing "I appeal" thus acquiring a place in line and eliminating any untimely issue. You chose not to appeal at that time. Within less than an hour of my "yes," you forwarded three "what if" scenarios with reference to the appeal extension.

OIP's decision on appeal AP-2011-00113 was rendered on April 22, 2011. As you know, that appeal decision, a partial grant, made determinations on several miscellaneous fee issues you had raised. Your next communication to me appears to have been on May 4, 2011<sup>1</sup> and was not, unfortunately, your belated appeal of the FBI matter, but rather three enumerated paragraphs in which you posed questions, hypotheticals, and comments about the April 22, 2011 appeal decision that had been rendered twelve days earlier. It also included a request for a second appeal extension. You requested that you now be allowed to submit your appeal "7 days from whatever day" OIP answered the question(s) posed in your May 4, 2011 email. On June 22, 2011, not having received a response from me, you sent another email asking again for a second extension of seven days referencing the matter as concerning a "current appeal."<sup>2</sup>

<sup>1</sup> Please advise if I have passed over any emails or other communications from you that are of import.

<sup>2</sup> As you may recall, I was out-of-office in excess of three weeks in May-June 2011 due to a family matter.

FILE COPY

- 2 -

Thereafter, I asked that you identify the "current appeal" of which you spoke in your June 22, 2011 email.<sup>3</sup> While I truly appreciate the patience you have shown in getting certain questions answered, the matter about which you wrote in your May 4, 2011 email did not concern a "current appeal" but rather a closed appeal that had been adjudicated on April 22, 2011. It has long been the practice of OIP that when a query is raised about an appeal post-adjudication, it is considered to be a request for reconsideration of that appeal decision, a post-appeal, non-statutory, non-regulatory practice that does not have a timetable for completion.

Having now reviewed the appeal that is the subject of this letter I find your argument that it is related to the various fee issues presented in Appeal No. AP-2011-00113, unpersuasive. Having said that, however, I will stand by my statement that I would grant you an extension for this current appeal and untimeliness is not being raised in this instance.

As you know, the statutory standard for evaluating fee waiver requests provides that fees shall be waived or reduced "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). In determining whether you have satisfied this statutory standard, I considered the six factors set out in the Department of Justice regulation that puts this statutory standard into effect. See 28 C.F.R. § 16.11(k) (2011). The first four of these factors concern the "public interest" requirement; the fifth and six factors concern whether your interest in the records is primarily commercial.

On the basis of all of the information available to me, I am affirming the FBI's denial of your request for a waiver of fees. Although the records you seek concern the operations or activities of the government, and you do not appear to have an overriding commercial interest commercial interest in the records, you have not satisfied other necessary factors, in particular factors two and four.

In order to qualify for a fee waiver you must demonstrate that you meet the release of the information to you is in the public interest because "it is likely to contribute significantly" to the public's understanding of the FBI's operations or activities. Importantly, the document you have asked for is publicly available on the FBI's web site. Requests for information that is already in the public domain generally do not warrant a fee waiver because the disclosure would not be likely to meet factor two where nothing new or substantive would be added to the public's understanding. You have provided nothing that would support altering the general standard in this instance. See e.g., Judicial Watch, Inc. v. DOJ, 365 F.3d 1108, 1127 (D.C. Cir. 2004) (upholding denial of blanket fee waiver, noting that plaintiff had failed to rebut government representation that information was in public domain). Courts in at least the 2nd, 9th, and 11th federal judicial circuits have reached the same conclusion: See, e.g., Sierra Club Def. Fund v. Bibles, No. 93-35383, slip op. at 4, 1994 U.S. App. LEXIS 23588, \*4 (9th Cir. Aug. 29, 1994) (noting plaintiff failed to explain "how its work would add anything to 'public understanding'"

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<sup>3</sup> The June 22, 2011 email from me asked you to identify the "current appeal" of which you spoke and the date of a particular email exchange.

- 3 -

where requested material already disseminated and publicized); Carney v. DOJ, 19 F.3d 807, 815 (2d Cir. 1994); see also Sloman v. DOJ, 832 F. Supp.63, 68 (S.D.N.Y. 1993) (stating that public's understanding would not be enhanced to significant extent where material was previously released to other writers and more important[ly]"was available in agency's public reading room").

Your initial presentation to the FBI consisted of a single sentence in support of your fee waiver request, stating that you "[w]ill make the MAOP publicly available on our website for free download." On appeal you further suggested that subsections 5 U.S.C. § 552(a)(2)(B) and (D) require that this document "be made publicly available" seemingly as additional grounds in support of your fee waiver request. The former subsection cited refers to "statements of policy or interpretations which have been adopted by the agency while the latter refers to frequently requested records. Regardless of which provision of the FOIA is relied on, the fact remains that the FBI does make this document publicly available in its electronic reading room, including a thirteen-page topical index, and that you propose to do no more than what the FBI already does.<sup>4</sup>

Lastly, I considered the FBI's assessment of duplication fees in the amount of \$65, and its request for your commitment to pay this estimated fee before production of any of the requested records. As you know, Department regulations allow a component to require that a requester commit to pay fees in excess of \$25 before it is obligated to release any responsive records. See 28 C.F.R. § 16.11(e).

By letter dated February 24, 2011, the FBI informed you that it had 2038 pages of records potentially responsive to your request. In response to that specific production request the FBI informed you that it would take approximately five CD-ROMs to complete the production and that you would be charged \$15 for each CD-ROM produced. As you are aware, Department regulations, based on the guidance provided by the Office of Management and Budget,<sup>5</sup> provide for the assessment of "direct costs" when a medium other than paper is used. "For copies produced by computer . . . components will charge the direct costs, including operator time, of producing that copy. For other forms of duplication, components will charge the direct costs of that duplication." 28 C.F.R. § 16.11(c)(2); see also 28 C.F.R. § 16.11(b)(2). Nonetheless, the FBI has not passed all of the "direct costs" of preparing a CD-ROM for release on to the requester. It is my understanding that none of the costs associated with scanning responsive documents into a pdf. file prior to loading records onto a CD-ROM have been passed on to any requester. Additionally, because all FBI FOIA requests are processed on its classified computer network, when a CD-ROM is prepared for release, it must undergo a more stringent process than simply saving the information to a CD-ROM. The CD-ROM must be run through an additional software application before it can be released and the cost of running this application (which takes approximately one hour for a 500-page release) exceeds the \$15 fee assessed by the FBI

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<sup>4</sup> I note in your appeal your make much of the fact that your request was for a "current" copy of the MAOP and in your appeal you mentioned your request for "the complete current edition." Unless you provided the FBI with a different version of your request, I note that the copy of your request in OIP's appeal file states that your request is for "[a]n electronic copy of the MAOP."

<sup>5</sup> OMB Fee Guidelines can be found at 52 Fed. Reg. 10012 (Mar. 27, 1987).

- 4 -

per CD-ROM. Accordingly, I find that the \$15 fee charged by the FBI per CD-ROM is reasonable.

Additionally, please be assured that there is no financial incentive for the FBI to use more than one CD-ROM. As I am sure you know, all FOIA fees collected are ultimately deposited into the United States Treasury and not into individual agency accounts. See Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10012 (Mar. 27, 1987) ("funds agencies receive for providing FOIA services are to be deposited in the general revenues of the United States rather than individual agency accounts").


The FBI determined its estimated duplication fee by multiplying the \$15 fee charged by the FBI per CD-ROM by five (the total estimated number of CD-ROMs required to produce the responsive records), less \$10 (the cost equivalent for the first one hundred pages to which you are entitled by statute), for a total of \$65.<sup>6</sup> In consideration of all of the facts above, I find this estimate to be reasonable. Accordingly, I am denying your appeal of the FBI's fee estimate and its request for a commitment to pay fee before producing any responsive records. If you wish instead to have only your statutory entitlement to the first one hundred pages of the MAOP please advise this Office.

As to your complaint about the number of pages put on a single CD, I enclose a copy of the April 22, 2011 letter to you which explains in detail the reason behind this practice at 2, first full paragraph, which I incorporate by reference.

Please be advised that this Office's decision was made only after a full review of this matter. Your appeal was assigned to an attorney with this Office who thoroughly reviewed and analyzed your appeal, your underlying request, and the actions of the FBI in response to your request.

If you are dissatisfied with my action on your appeal, the FOIA permits you to file a lawsuit in federal district court in accordance with 5 U.S.C. § 552(a)(4)(B).

Sincerely,



Janice Galli McLeod  
Associate Director

Enclosure

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<sup>6</sup> While the fees will be no higher than \$65.00 it is likely that the total fees owed will be \$50.00.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
		)	
Plaintiffs,		)	
		)	
v.		)	Civ. A. No. 1:13-cv-00556-RC
		)	
DEPARTMENT OF JUSTICE,		)	
		)	
Defendant.		)	
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EXHIBIT M



U.S. Department of Justice



**Federal Bureau of Investigation**  
 Washington, D.C. 20535

July 25, 2013

Kel McClanahan, Esq.  
 National Security Counselors  
 Suite 124  
 1200 South Courthouse Road  
 Arlington, VA 22204

FOIPA Request No.: 1148707-005  
 Subject: MAOP

Dear Mr. McClanahan:

The enclosed documents were reviewed under the Freedom of Information Act (FOIA), Title 5, United States Code, Section 552. Deletions have been made to protect information which is exempt from disclosure, with the appropriate exemptions noted on the page next to the excision. In addition, a deleted page information sheet was inserted in the file to indicate where pages were withheld entirely. The exemptions used to withhold information are marked below and explained on the enclosed Explanation of Exemptions:

<b>Section 552</b>		<b>Section 552a</b>
<input type="checkbox"/> (b)(1)	<input type="checkbox"/> (b)(7)(A)	<input type="checkbox"/> (d)(5)
<input checked="" type="checkbox"/> (b)(2)	<input type="checkbox"/> (b)(7)(B)	<input type="checkbox"/> (j)(2)
<input type="checkbox"/> (b)(3)	<input type="checkbox"/> (b)(7)(C)	<input type="checkbox"/> (k)(1)
_____	<input type="checkbox"/> (b)(7)(D)	<input type="checkbox"/> (k)(2)
_____	<input checked="" type="checkbox"/> (b)(7)(E)	<input type="checkbox"/> (k)(3)
_____	<input type="checkbox"/> (b)(7)(F)	<input type="checkbox"/> (k)(4)
<input type="checkbox"/> (b)(4)	<input type="checkbox"/> (b)(8)	<input type="checkbox"/> (k)(5)
<input type="checkbox"/> (b)(5)	<input type="checkbox"/> (b)(9)	<input type="checkbox"/> (k)(6)
<input type="checkbox"/> (b)(6)		<input type="checkbox"/> (k)(7)

495 pages were reviewed and 495 pages are being released.

☐ Document(s) were located which originated with, or contained information concerning other Government agency(ies) [OGA]. This information has been:

☐ referred to the OGA for review and direct response to you.

☐ referred to the OGA for consultation. The FBI will correspond with you regarding this information when the consultation is finished.

☐ In accordance with standard FBI practice and pursuant to FOIA exemption (b)(7)(E) and Privacy Act exemption (j)(2) [5 U.S.C. § 552/552a (b)(7)(E)/(j)(2)], this response neither confirms nor denies the existence of your subject's name on any watch lists.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

☒ You have the right to appeal any denials in this release. Appeals should be directed in writing to the Director, Office of Information Policy (OIP), U.S. Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-0001, or you may submit an appeal through OIP's eFOIA portal at <http://www.justice.gov/oip/efoia-portal.html>. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIPA Request Number assigned to your request so that it may be easily identified.

☐ The enclosed material is from the main investigative file(s) in which the subject(s) of your request was the focus of the investigation. Our search located additional references, in files relating to other individuals, or matters, which may or may not be about your subject(s). Our experience has shown when ident, references usually contain information similar to the information processed in the main file(s). Because of our significant backlog, we have given priority to processing only the main investigative file(s). If you want the references, you must submit a separate request for them in writing, and they will be reviewed at a later date, as time and resources permit.

☒ See additional information which follows.

Sincerely,



David M. Hardy  
Section Chief  
Record/Information  
Dissemination Section  
Records Management Division

Enclosures (2)

Enclosed is a processed copy of the FBI MAOP as it existed on July 2, 2013. Since March 2008, the FBI has been reviewing and replacing the MAOP with Corporate Policy Office Directives and Policy Implementation Guides. As new policy documents are approved, the appropriate sections of the MAOP are updated on the FBI's intranet, where the MAOP is maintained.

The FBI is making this release to you, at no charge, in an effort to narrow the issues in dispute in NSC et al. v. DOJ, Civ. No. 13-cv-556 (D.D.C.). It is a discretionary release and is being made subject to, and without waiver of, the FBI's defenses (including, but not limited to, all defenses set forth at the administrative level) with respect to the claims at issue in the above-referenced lawsuit.

Please note that a Table of Contents is no longer being maintained for the MAOP, but we have included a PDF version of the library index listing all of the sections existing in the MAOP as of July 2, 2013. Lastly, there is currently no Section 7 in Part 2 of the MAOP.

**EXPLANATION OF EXEMPTIONS****SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552**

- (b)(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified to such Executive order;
- (b)(2) related solely to the internal personnel rules and practices of an agency;
- (b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ( A ) could reasonably be expected to interfere with enforcement proceedings, ( B ) would deprive a person of a right to a fair trial or an impartial adjudication, ( C ) could reasonably be expected to constitute an unwarranted invasion of personal privacy, ( D ) could reasonably be expected to disclose the identity of confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, ( E ) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or ( F ) could reasonably be expected to endanger the life or physical safety of any individual;
- (b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (b)(9) geological and geophysical information and data, including maps, concerning wells.

**SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a**

- (d)(5) information compiled in reasonable anticipation of a civil action proceeding;
- (j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;
- (k)(1) information which is currently and properly classified pursuant to an Executive order in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;
- (k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;
- (k)(4) required by statute to be maintained and used solely as statistical records;
- (k)(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service the release of which would compromise the testing or examination process;
- (k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his/her identity would be held in confidence.

FBI/DOJ

OS-2018-000959-01078

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
		)	
Plaintiffs,		)	
		)	
v.		)	Civ. A. No. 1:13-cv-00556-RC
		)	
DEPARTMENT OF JUSTICE,		)	
		)	
Defendant.		)	
<hr/>		)	

EXHIBIT N

## NATIONAL SECURITY COUNSELORS

1200 SOUTH COURTHOUSE ROAD  
SUITE 124  
ARLINGTON, VA 22204

TELEPHONE: (301) 728-5908  
FACSIMILE: (240) 681-2189

KEL MCCLANAHAN, ESQ., EXECUTIVE DIRECTOR (admitted in NY, DC)  
EMAIL: KEL@NATIONALSECURITYLAW.ORG

BRADLEY P. MOSS, ESQ., DEPUTY EXECUTIVE DIRECTOR (admitted in IL, DC)  
EMAIL: BRAD@NATIONALSECURITYLAW.ORG

13 September 2011

David M. Hardy, Chief  
Record/Information Dissemination Section  
Records Management Division  
Federal Bureau of Investigation  
170 Marcel Drive  
Winchester, VA 22602-4843

Re: FOIA Request – RMD website

Dear Mr. Hardy:

This is a request on behalf of my client Jeff Stein under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.*, for a copy of **all pages on the internal Federal Bureau of Investigation ("FBI") Records Management Division ("RMD") website <http://rmd.fbinet.fbi>**, as well as all documents, images, audio and video files, and any other files posted on the RMD website. The date this information is obtained from the website is not important, so the FBI FOIA analyst processing this request should feel free to simply obtain the responsive records on the day he/she begins the search. You may exclude any records currently available on a public U.S. government website to which the RMD website simply provides links. You may also exclude the 100 pages provided to National Security Counselors in response to FOIA Request No. 1159046-000, as we have already made this information publicly available on our website. Mr. Stein is to be considered the only requester for your administrative purposes; National Security Counselors is *not* to be considered a requester. I have attached a signed authorization form to this effect.

When processing this request, please note that the DC Circuit has previously held that agencies have a duty to construe the subject material of FOIA requests *liberally* to ensure responsive records are not overlooked. See *Nation Magazine, Washington Bureau v. U.S. Customs Service*, 71 F.3d 885, 890 (D.C. Cir. 1995). Accordingly, you are hereby instructed that the term "record" includes, *but is not limited to*: 1) all email communications to or from any individual within your agency; 2) memoranda; 3) inter-agency communications; 4) sound recordings; 5) tape recordings; 6) video or film recordings; 7) photographs; 8) notes; 9) notebooks; 10) indices; 11) jottings; 12) message slips; 13) letters or correspondence; 14) telexes; 15) telegrams; 16) facsimile transmissions; 17) statements; 18) policies; 19) manuals or binders; 20) books; 21) handbooks; 22) business records; 23) personnel records; 24) ledgers; 25)

notices; 26) warnings; 27) affidavits; 28) declarations under penalty of perjury; 29) unsworn statements; 30) reports; 31) diaries; or 32) calendars; regardless of whether they are handwritten, printed, typed, mechanically or electronically recorded or reproduced on any medium capable of conveying an image, such as paper, CDs, DVDs, or diskettes. Furthermore, in line with the guidance issued by the Department of Justice ("DOJ") on 9 September 2008 to all federal agencies with records subject to FOIA, agency records that are currently in the possession of a U.S. Government contractor for purposes of records management remain subject to FOIA. Similarly, all documents should be reviewed in their entirety, and no information be omitted on the grounds of "non-relevance." Finally, please consider this letter an affirmative rejection of any limitation of your search to records created prior to the date of this request. To the contrary, Mr. Stein stipulates that this search should be restricted to records created prior to the date of the first substantive review of this request by FBI FOIA personnel (as opposed to the date that receipt of the request was acknowledged by the FBI).

In conclusion, the FBI is hereby instructed to interpret the scope of this request in the most liberal manner possible short of an interpretation that would lead to a conclusion that the request does not reasonably describe the records sought. If, even given these restrictions, the FBI still determines that this request does not reasonably describe the records sought, it is instructed to contact me pursuant to 28 C.F.R. § 16.3 to discuss reformulation of the request before rejecting the request as overbroad, vague, or unduly burdensome.

If you deny all or part of this request, please cite the specific exemptions you believe justify your refusal to release the information or permit the review and notify us of your appeal procedures available under the law. In excising material, please "black out" rather than "white out" or "cut out." In addition, I draw your attention to President Obama's 21 January 2009 *Memorandum for the Heads of Executive Departments and Agencies*, directing federal agencies to adopt a presumption in favor of disclosure and stating that government information should not be kept confidential "merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears." To permit Mr. Stein to reach an intelligent and informed decision whether or not to file an administrative appeal of any denied material, please describe any withheld records (or portions thereof) and explain the basis for your exemption claims. This description should include a list of the withheld documents, pursuant to *Shermco Indus. v. Sec'y of the U.S. Air Force*, 452 F. Supp. 306, 317 n.7 (N.D. Tx. 1978) ("A person cannot effectively appeal a decision about the releasability of documents . . . if he is not informed of at least a list of the documents to which he was denied access . . . and why those decisions were made. Denial of this information would in all likelihood be a violation of due process as well as effectively gutting the reasons for applying the exhaustion doctrine in FOIA cases.").

Mr. Stein qualifies as a representative of the news media. He is an investigative reporter of long standing, specializing in U.S. intelligence, defense, and foreign policy. An Army Intelligence case officer in Vietnam, he also launched CQ's Homeland Security daily in 2002 and served as national security editor. A frequent contributor to national magazines and Op-ed pages over the years, Jeff was deputy foreign editor for UPI during the 1980s. He has appeared on virtually every U.S. and foreign television and radio network as a commentator on national security issues. His SpyTalk blog is one of the most recognized national security news blogs in

existence. According to 5 U.S.C. § 552(a)(4)(A)(ii), codifying the ruling of *Nat'l Security Archive v. Dep't of Defense*, 880 F.2d 1381 (D.C. Cir. 1989),

the term "a representative of the news media" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

Mr. Stein has clear intent to "publish[ ] or otherwise disseminate[ ] information to the public." *Id.* at 1386 (quoting the following legislative history: 1) "It is critical that the phrase 'representative of the news media' be broadly interpreted if the act is to work as expected. . . . In fact, any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a 'representative of the news media.'" 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986) (emphasis in original quotation); 2) "A request by a reporter or other person affiliated with a newspaper, magazine, television or radio station, or other entity that is in the business of publishing or otherwise disseminating information to the public qualifies under this provision." 132 Cong. Rec. H9463 (Oct. 8, 1986) (emphasis in original quotation)). Therefore, in accordance with the Freedom of Information Act and relevant case law, Mr. Stein should be considered a representative of the news media.

Mr. Stein is also requesting a public interest fee waiver. There can be no question that the information sought would contribute to the public's understanding of government operations or activities and is in the public interest. Despite the government-wide increase in transparency over the last few years, very little is still known about the way in which the FBI organizes its files and manages its records. This website featured prominently in the Records Management Overview training video recently obtained by the Black Vault (<http://publicscreening.theblackvault.com/publicscreening/FBIRecordsManagement.html>) and was touted in the video as the source of all the information FBI employees would need regarding FBI records management. These records will shed much-needed light on the FBI's records management system, which in turn will contribute to the public's understanding of government operations or activities.

I also specifically state for the record Mr. Stein's unwillingness to pay any fees for this request. Please do not delay the processing of this request by needlessly requesting further confirmation of this unwillingness to pay fees or terminate the processing of this request for failure to provide you with such confirmation. This statement is a full and unequivocal refusal to pay any fees for this request.

Please ensure that, in accordance with the DC Circuit's ruling in *Chambers v. Dep't of the Interior*, 568 F.3d 998 (D.C. Cir. 2009), all records potentially responsive to this FOIA request are immediately preserved from destruction until the final resolution of this FOIA action. Destruction of potentially responsive records after the receipt of a FOIA request is considered "contumacious conduct" by the DC Circuit. *See id.* at 1004.

The FBI is required by law to respond to this request within 20 working days. Failure to timely comply may result in the filing of a civil action against your agency in a United States District Court.

Please provide any records produced in response to this request in the *original* electronic (soft-copy) forms in which they are posted on the RMD website (e.g., word processing documents should remain word processing documents, spreadsheets should remain spreadsheets, image files should remain image files, etc.). The only exception to this rule is that actual webpages may be converted to Adobe Acrobat files. Please provide soft-copy records by email or on a CD if email is not feasible. If a CD is necessary, Mr. Stein specifically absolves the FBI of its responsibility to make interim releases and directs the FBI to provide *all* responsive records on *one* CD at the end of its processing of this request unless all the records will not physically fit on one CD.

However, Mr. Stein does not agree to pay an additional fee to receive records on a CD, and in the instance that such a fee is required, he will accept a paper copy of responsive non-audio/visual records. If a public interest fee waiver is granted, the previous statement is moot, as Mr. Stein expects that this will waive the charges for any CDs as well, thereby allowing the FBI to release the soft-copy records to him free of charge.

Your cooperation in this matter would be appreciated. If you wish to discuss this request, please do not hesitate to contact me.

Sincerely,



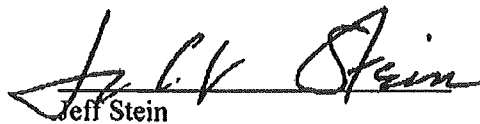
Kel McClanahan



**AUTHORIZATION AND PRIVACY WAIVER**

I, Jeff Stein, hereby authorize the law firm National Security Counselors and any attorney associated with it (collectively "my attorneys") to file Freedom of Information Act ("FOIA") requests on my behalf with any agency of the United States government. I am to be considered the "requester" in these instances and not my attorneys. I also authorize any agency of the United States government to discuss any FOIA requests filed by me or on my behalf with my attorneys. A photocopy of this authorization shall have the same effect as the original.

I do solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true to the best of my knowledge.

  
Jeff Stein

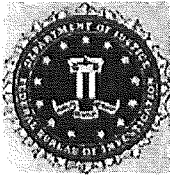
9/8/11  
Date

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. A. No. 1:13-cv-00556-RC
	)	
DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	

EXHIBIT O

U.S. Department of Justice



Federal Bureau of Investigation

Washington, D.C. 20535

September 15, 2011

MR. JEFF STEIN  
C/O KEL MCCLANAHAN, ESQ.  
NATIONAL SECURITY COUNSELORS  
SUITE 124  
1200 SOUTH COURTHOUSE ROAD  
ARLINGTON, VA 22204

FOIPA Request No.: 1173246- 000  
Subject: FBI RMD WEBSITE

Dear Mr. Stein:

This acknowledges receipt of your Freedom of Information/Privacy Acts (FOIPA) request to the FBI.

- ☒ This FOIPA request has been received at FBI Headquarters for processing.
- ☐ This FOIPA request has been received at the [\_\_\_\_\_] **Resident Agency /** [\_\_\_\_\_] **Field Office]** and forwarded to FBI Headquarters for processing.
- ☒ We are searching the indices to our Central Records System for the information responsive to this request. You will be informed of the results in future correspondence.
- ☒ Your request for a fee waiver is being considered and you will be advised of the decision at a later date.
- ☒ Please check for the status of your FOIPA request at [www.fbi.gov/foia](http://www.fbi.gov/foia)

The FOIPA Request number listed above has been assigned to your request. Please use this number in all correspondence concerning your request. Your patience is appreciated.

Very truly yours,

A handwritten signature in black ink, appearing to read "D. Hardy", is written below the "Very truly yours," text.

David M. Hardy  
Section Chief,  
Record/Information

Dissemination Section

Records Management Division

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. A. No. 1:13-cv-00556-RC
	)	
DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	

EXHIBIT P

U.S. Department of Justice



Federal Bureau of Investigation

Washington, D.C. 20535

September 27, 2012

MR. JEFF STEIN  
C/O KEL MCCLANAHAN, ESQ.  
NATIONAL SECURITY COUNSELORS  
SUITE 124  
1200 SOUTH COURTHOUSE ROAD  
ARLINGTON, VA 22204

Subject: FBI RMD WEBSITE

FOIPA No. 1173246- 000

Dear Mr. Stein:

The enclosed documents were reviewed under the Freedom of Information/Privacy Acts (FOIPA), Title 5, United States Code, Section 552/552a. Deletions have been made to protect information which is exempt from disclosure, with the appropriate exemptions noted on the page next to the excision. In addition, a deleted page information sheet was inserted in the file to indicate where pages were withheld entirely. The exemptions used to withhold information are marked below and explained on the enclosed Form OPCA-16a:

552a	Section 552	Section
<input type="checkbox"/> (b)(1)	<input type="checkbox"/> (b)(7)(A)	<input type="checkbox"/> (d)(5)
<input type="checkbox"/> (b)(2)	<input type="checkbox"/> (b)(7)(B)	<input type="checkbox"/> (j)(2)
<input type="checkbox"/> (b)(3)	<input checked="" type="checkbox"/> (b)(7)(C)	<input type="checkbox"/> (k)(1)
	<input checked="" type="checkbox"/> (b)(7)(D)	<input type="checkbox"/> (k)(2)
	<input checked="" type="checkbox"/> (b)(7)(E)	<input type="checkbox"/> (k)(3)
	<input type="checkbox"/> (b)(7)(F)	<input type="checkbox"/> (k)(4)
<input type="checkbox"/> (b)(4)	<input type="checkbox"/> (b)(8)	<input type="checkbox"/> (k)(5)
<input type="checkbox"/> (b)(5)	<input type="checkbox"/> (b)(9)	<input type="checkbox"/> (k)(6)
<input checked="" type="checkbox"/> (b)(6)		<input type="checkbox"/> (k)(7)

579 pages were reviewed and 567 pages are being released.

☐ Document(s) were located which originated with; or contained information concerning other Government agency(ies) [OGA]. This information has been:

☐ referred to the OGA for review and direct response to you.

☐ referred to the OGA for consultation. The FBI will correspond with you regarding this information when the consultation is finished.

☐ In accordance with standard FBI practice, this response neither confirms nor denies the existence of your subject's name on any watch lists.

☒ You have the right to appeal any denials in this release. Appeals should be directed in writing to the Director, Office of Information Policy, U.S. Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-0001. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly

marked "Freedom of Information Appeal." Please cite the FOIPA Number assigned to your request so that it may be easily identified.

☐ The enclosed material is from the main investigative file(s) in which the subject(s) of your request was the focus of the investigation. Our search located additional references, in files relating to other individuals, or matters, which may or may not be about your subject(s). Our experience has shown, when ident, references usually contain information similar to the information processed in the main file(s). Because of our significant backlog, we have given priority to processing only the main investigative file(s). If you want the references, you must submit a separate request for them in writing, and they will be reviewed at a later date, as time and resources permit.

☒ See additional information which follows.

Sincerely yours,



David M. Hardy  
Section Chief  
Record/Information  
Dissemination Section  
Records Management Division

Enclosures (2)

In response to your Freedom of Information Act (FOIA) request submitted to FBI Headquarters, enclosed is a processed copy of the FBI RMD Website, sections RMD Main Pages and FBI RMD Main Announcements.

In processing the responsive documents, the material considered for possible release include only material on the RMD website. Pages/documents/videos linked to the RMD website were not considered for possible release.

Your request for a waiver of fees has been denied. Our decision on this matter is based on the statutory standard and the fee waiver guidelines issued by the Department of Justice.

The enclosed documents on CD represent the first interim release of information responsive to your FOIA request. To expedite your request, the enclosed material is being sent in advance of payment. Pursuant to Title 28, Code of Federal Regulations, Sections 16.11 and 16.49, there is a fee of ten cents per page for duplication in excess of 100 pages or \$15.00 per CD. Please note that each CD can contain approximately 500 pages. The first 100 pages of duplication, or the cost equivalent (\$10.00) for releases on CD, will be provided to you at no charge and therefore no fees are being assessed for the first CD. Should you choose to receive additional releases by agreeing to pay the estimated duplication fees, you will be billed for the \$5.00 associated with this first release as well as the \$15.00 duplication fee for the second release for a total of \$20.00. Each subsequent release will be made at a cost of \$15.00.

We have located approximately 21,753 additional pages which are potentially responsive to your request. Pursuant to Title 28, Code of Federal Regulations (CFR), Sections 16.11 and 16.49, there is a duplication fee of ten cents per page. The first 100 free pages are enclosed. Regulations require us to notify requesters when anticipated charges exceed \$25, and if all of the pages are released, you will owe \$2175.30 in duplication fees to receive a paper copy or \$665.00 (44 CD's at \$15.00 plus \$5.00) to receive the release on CD. Please remember this is only an estimate, and if some of the pages are withheld or are not identifiable with your subject, the actual charges could be less.

You may want to consider reducing the scope of your request. This would allow you to lower your costs and hasten the receipt of your information. To streamline our operation, we divide our requests into three tracks based on the amount of material to be processed: small (1-500 pages); medium (501-2500 pages) and large (2501 or more pages), with the small track having the fastest rate of processing. To accelerate the processing of your request, you must reduce the pages to be processed to 500 pages or less. Please let us know in writing **within 30 days** if you are interested in discussing the possibility of reducing the scope of your request or if you are willing to pay the estimated duplication cost indicated in the above paragraph. Your written response should provide a telephone number where you can be reached between the hours of 8:00 a.m. and 5:00 p.m., EST. You may also fax your response to the following number: 540-868-4996, Attention: Work Processing Unit. You must include the FOIPA request number in any communication regarding this matter.

**EXPLANATION OF EXEMPTIONS****SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552**

- (b)(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified to such Executive order;
- (b)(2) related solely to the internal personnel rules and practices of an agency;
- (b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ( A ) could be reasonably be expected to interfere with enforcement proceedings, ( B ) would deprive a person of a right to a fair trial or an impartial adjudication, ( C ) could be reasonably expected to constitute an unwarranted invasion of personal privacy, ( D ) could reasonably be expected to disclose the identity of confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, ( E ) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or ( F ) could reasonably be expected to endanger the life or physical safety of any individual;
- (b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (b)(9) geological and geophysical information and data, including maps, concerning wells.

**SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a**

- (d)(5) information compiled in reasonable anticipation of a civil action proceeding;
- (j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;
- (k)(1) information which is currently and properly classified pursuant to an Executive order in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;
- (k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;
- (k)(4) required by statute to be maintained and used solely as statistical records;
- (k)(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service the release of which would compromise the testing or examination process;
- (k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his/her identity would be held in confidence.

FBI/DOJ

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. A. No. 1:13-cv-00556-RC
	)	
DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
_____	)	

EXHIBIT Q



**Sobonya, David P.**

---

**From:** Jason Leopold [jason@truthout.org]  
**Sent:** Tuesday, May 22, 2012 7:39 PM  
**To:** FOIPA\_Request  
**Subject:** Request for Documents Under the Freedom of Information Act

Dear FOIA Officer,

This is a request for documents under the Freedom of Information Act. I am seeking all FBI documents, which includes but is not limited to, emails, memos, transcripts, training materials, PowerPoint presentations, video and audio presentations, slides in which the FBI, its Joint Terrorism Task Force offices and/or so-called FBI "campus liaison agents" and the FBI's Campus Liaison Initiative work with and/or partner with college campus police chiefs and/or college campus administrators on confronting radical extremism and terrorism on college campuses throughout the country as well as the same documents pertaining to intelligence sharing arrangements between campus police chiefs, campus administrators and other officials and FBI, vice-versa. I am also seeking a list of and description of all of the threats reported to FBI field offices, agents, headquarters by university and/or college campus police and administrators from 2008 through the present.

Moreover, I am seeking all FBI documents, which includes but is not limited to, emails, memos, transcripts, training materials, PowerPoint presentations, video and audio presentations, slides, in which the FBI-led National Security Advisory Board and Federal Law Enforcement Training Center instructs local law enforcement on "physical techniques" to "behavioral science."

I request this information to be released in electronic format if possible. I request the FBI conduct a separate search all of its field offices for the information in addition to searching the Central Record System and any other databases in order to locate responsive records. I am lead investigative reporter of Truthout.org ([www.truthout.org/about](http://www.truthout.org/about)), an online news publication that publishes news and commentary seven days a week, 365 days a year.

If you regard these documents/files/records as potentially exempt from disclosure requirements, I request that you nonetheless exercise your discretion to disclose them. Please release all reasonably segregable nonexempt portions of documents. If you deny all or any part of this request, please cite each specific exemption you think justifies your refusal to release the information and notify me of appeal procedures available under the law.

If there are any fees for searching for, reviewing, or copying the records, please notify me before processing if the amount exceeds \$500. If you have any questions related to this request please contact me at 213 270 4334 or via email.

Kind regards,  
Jason Leopold

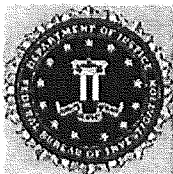
Jason Leopold  
Lead Investigative Reporter  
Truthout.org  
1669 Benedict Canyon Drive  
Beverly Hills, CA 90210  
[jason@truthout.org](mailto:jason@truthout.org)  
213 270 4334

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. A. No. 1:13-cv-00556-RC
	)	
DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	

EXHIBIT R

U.S. Department of Justice



Federal Bureau of Investigation

Washington, D.C. 20535

August 17, 2012

MR. JASON LEOPOLD  
1669 BENEDICT CANYON DRIVE  
BEVERLY HILLS, CA 90210

FOIPA Request No.: 1197184- 000  
Subject: FBI'S CAMPUS LIAISON INITIATIVE

Dear Mr. Leopold:

This acknowledges receipt of your Freedom of Information/Privacy Acts (FOIPA) request to the FBI.

- ☒ This FOIPA request has been received at FBI Headquarters for processing.
- ☐ This FOIPA request has been received at the [\_\_\_\_ Resident Agency / \_\_\_\_ Field Office] and forwarded to FBI Headquarters for processing.
- ☒ We are searching the indices to our Central Records System for the information responsive to this request. You will be informed of the results in future correspondence.
- ☐ Your request for a fee waiver is being considered and you will be advised of the decision at a later date.
- ☒ Please check for the status of your FOIPA request at [www.fbi.gov/foia](http://www.fbi.gov/foia)

The FOIPA Request number listed above has been assigned to your request. Please use this number in all correspondence concerning your request. Your patience is appreciated.

Very truly yours,

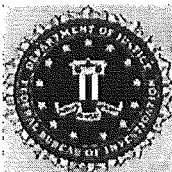
A handwritten signature in black ink, appearing to read "D. Hardy", is placed below the "Very truly yours," text.

David M. Hardy  
Section Chief,  
Record/Information

Dissemination Section

Records Management Division

U.S. Department of Justice



Federal Bureau of Investigation

Washington, D.C. 20535  
August 17, 2012

MR. JASON LEOPOLD  
1669 BENEDICT CANYON DRIVE  
BEVERLY HILLS, CA 90210

FOIPA Request No.: 1197184- 000  
Subject: FBI'S CAMPUS LIAISON INITIATIVE

Dear Mr. Leopold:

This is in reference to your Freedom of Information Act (FOIA) request.

By letter dated May 22, 2012, you indicated your willingness to pay \$500. We have located approximately 26,000 pages which are potentially responsive to your request. Pursuant to the U.S. Department of Justice (DOJ) regulations, 28 C.F.R. §§ 16.11 and 16.49, there is a duplication fee of ten cents per page if you receive a paper copy. Releases are also available on CD upon request. Each CD contains approximately 500 pages per release. The 500 page estimate is based on our business practice of processing medium and large track cases through interim releases that generally equal approximately 500 pages. The first 100 pages of duplication, or the cost equivalent (\$10.00) for releases on CD, will be provided to you at no charge. In accordance with the DOJ regulations, the FBI notifies requesters when anticipated fees exceed \$25.00. If all of the pages that are potentially responsive to your request are released, you will owe \$2590.00 in duplication fees to receive a paper copy or \$765 (52 CD's at \$15.00 less \$10.00) to receive the release on a CD. Please remember this is only an estimate, and if some of the pages are withheld in full pursuant to FOIA/Privacy Act exemption(s) or are determined to not be responsive to your request, the actual charges could be less.

To accelerate the processing of your request, you may wish to consider reducing the scope of your request so that it will fall within one of the smaller queues. This may allow you to lower your search and duplication costs and hasten the receipt of your information. The FBI uses a three-queue system as a way to fairly assign and process new requests. The placement of a request in one of the three queues depends on the total number of pages responsive to that request - 500 pages or less (small queue), 501 pages to 2500 pages (medium queue), or more than 2500 pages (large queue). The small queue has the fastest rate of processing. Please let us know in writing if you are interested in discussing the possibility of reducing the scope of your request, as well as your willingness to pay the estimated search and duplication costs indicated in the above paragraph. Your written response should provide a telephone number where you can be reached between the hours of 8:00 a.m. and 5:00 p.m., EST, if one is available. Please send this response to: Work Process Unit, Record Information/Dissemination Section, Records Management Division, Federal Bureau of Investigation, 170 Marcel Drive, Winchester, VA 22602. You may also fax your response to the following number: 540-868-4997, Attention: Work Process Unit.

**No payment is required at this time.** However, you must notify us in writing within thirty (30) days from the date of this letter of your format decision (paper or CD) and your commitment to pay the estimated fee. If we do not receive your commitment to pay within thirty (30) days of the date of this notification, your request will be closed. Please include the FOIPA Request Number listed above in any communication regarding this matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "D. Hardy", is located below the "Sincerely yours," text.

David M. Hardy  
Section Chief,  
Record/Information  
Dissemination Section  
Records Management Division

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

<hr/>		)	
NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
		)	
Plaintiffs,		)	
		)	
v.		)	Civ. A. No. 1:13-cv-00556-RC
		)	
DEPARTMENT OF JUSTICE,		)	
		)	
Defendant.		)	
<hr/>		)	

EXHIBIT S

## NATIONAL SECURITY COUNSELORS

1200 SOUTH COURTHOUSE ROAD  
SUITE 124  
ARLINGTON, VA 22204

TELEPHONE: (301) 728-5908  
FACSIMILE: (240) 681-2189

KEL MCCLANAHAN, ESQ., EXECUTIVE DIRECTOR (admitted in NY, DC)  
EMAIL: KEL@NATIONALSEcurityLAW.ORG  
BRADLEY P. MOSS, ESQ., DEPUTY EXECUTIVE DIRECTOR (admitted in IL, DC)  
EMAIL: BRAD@NATIONALSEcurityLAW.ORG

7 September 2012

Melanie Ann Pustay  
Director  
Office of Information Policy  
U.S. Department of Justice  
1425 New York Avenue, NW  
Suite 11050  
Washington, DC 20530-0001

Re: FBI FOIA Request #1197184-000

Dear Ms. Pustay:

I am writing on behalf of my client Truthout in response to Mr. Hardy's 17 August 2012 response to the above indicated FOIA request. Truthout hereby appeals the determination that the FBI will only release 500 pages of records per CD, thereby requiring the payment of significantly more duplication fees than would be necessary if the CDs were filled to capacity.


The FBI claims that this 500-page restriction is in place to allow it to make interim releases. Specifically, "The 500 page estimate is based on our business practice of processing medium and large track cases through interim releases that generally equal approximately 500 pages." Accordingly, Truthout specifically absolves the FBI of its responsibility to make interim releases and directs the FBI to fill each CD to capacity and charge Truthout accordingly for the actual number of CDs used. This means that the FBI may *not* arbitrarily limit each CD to approximately 500 pages.

For the above stated reasons, please reverse the FBI's determination and order the FBI to provide all pages responsive to this request on the fewest possible CDs.

So that the FBI can continue to process this request while you consider this appeal, Truthout does commit to paying the \$765 duplication fee if you affirm the FBI's initial determination. However, Truthout reserves the right to seek judicial review of an unfavorable appeal decision on this matter, with the intent of reducing the fees to account for the proper number of CDs the FBI *should have* used.

Your cooperation in this matter would be appreciated. If you wish to discuss this appeal, please do not hesitate to contact me.

Sincerely,



Kel McClanahan

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

<hr/>		)	
NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
		)	
Plaintiffs,		)	
		)	
v.		)	Civ. A. No. 1:13-cv-00556-RC
		)	
DEPARTMENT OF JUSTICE,		)	
		)	
Defendant.		)	
<hr/>		)	

EXHIBIT T





U.S. Department of Justice

Office of Information Policy

Telephone: (202) 514-3642

Washington, D.C. 20530

SEP 26 2012

Kel McClanahan, Esq.  
National Security Counselors  
Suite 124  
1200 South Courthouse Road  
Arlington, VA 22204

Re: Request No. 1197184 - Truthout

Dear Mr. McClanahan:

This is to advise you that your administrative appeal from the action of the Federal Bureau of Investigation was received by this Office on September 7, 2012.

The Office of Information Policy has the responsibility of adjudicating such appeals. In an attempt to afford each appellant equal and impartial treatment, we have adopted a general practice of assigning appeals in the approximate order of receipt. Your appeal has been assigned number **AP-2012-03398**. Please mention this number in any future correspondence to this Office regarding this matter.

We will notify you of the decision on your appeal as soon as we can. If you have any questions about the status of your appeal you may contact me at the number above.

Sincerely,

A handwritten signature in black ink, appearing to read "Priscilla Jones", written over a horizontal line.

Priscilla Jones  
Supervisory Administrative Specialist

FILE COPY

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,		)	
		)	
Plaintiffs,		)	
		)	
v.		)	Civ. A. No. 1:13-cv-00556-RC
		)	
DEPARTMENT OF JUSTICE,		)	
		)	
Defendant.		)	
<hr/>		)	

EXHIBIT U



U.S. Department of Justice  
Office of Information Policy  
Suite 11050  
1425 New York Avenue, NW  
Washington, DC 20530-0001

Telephone: (202) 514-3642

MAR 12 2013

Kel McClanahan, Esq.  
National Security Counselors  
Suite 124  
1200 South Courthouse Road  
Arlington, VA 22204

Re: Appeal No. AP-2012-03398  
Request No. 1197184  
MTC:BT

Dear Mr. McClanahan:

You appealed on behalf of your client, Truthout, from the fee determination made by the Federal Bureau of Investigation on its request for access to records concerning the FBI's Campus Liaison Initiative.

I have been informed that you filed a lawsuit concerning the FBI's action in the United States District Court for the District of Columbia. Inasmuch as this matter is now before the Court, I am closing your appeal file in this Office in accordance with 28 C.F.R. § 16.9(a)(3) (2012).

Sincerely,

A handwritten signature in black ink, appearing to read "Sean R. O'Neill", written over a horizontal line.

Sean R. O'Neill  
Chief  
Administrative Appeals Staff

FILE COPY

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. A. No. 1:13-cv-00556-RC
	)	
DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
_____	)	

**SECOND DECLARATION OF DAVID M. HARDY**

I, David M. Hardy, declare as follows:

(1) I am the Section Chief of the Record/Information Dissemination Section ("RIDS"), Records Management Division ("RMD"), located to Winchester, Virginia. I have held this position since August 1, 2002. Prior to my joining the Federal Bureau of Investigation ("FBI"), from May 1, 2001 to July 31, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act ("FOIA") policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the State of Texas since 1980.

(2) In my official capacity as Section Chief of RIDS, I supervise approximately 261 employees who staff a total of ten (10) FBI Headquarters ("FBIHQ") units and two (2) field operational service center units whose collective mission is to effectively plan, develop, direct, and manage responses to requests for access to FBI records and information pursuant to the

FOIA as amended by the OPEN Government Act of 2007 and the OPEN FOIA Act of 2009; Privacy Act of 1974; Executive Order 13,526, Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. Specifically, I am aware of the treatment that has been afforded National Security Counselor's FOIA request for the Manual of Administrative Operations and Procedures ("MAOP"), as well as RIDS's decisions about fees with respect to all three FOIA requests at issue in this lawsuit. I am also aware of the protocol adopted and followed by RIDS for assessing and charging fees associated with the processing of FOIA requests, and specifically the policy for charging fees associated with the production of responsive records on compact discs ("CDs").


(4) This is my second declaration in this case, and incorporates and supplements my first declaration ("1<sup>st</sup> Hardy Decl."). *See* Docket ("Dkt.") No. 12-2. This declaration is being submitted in further support of defendant's motion for summary judgment.

(5) The letter attached to my first declaration as Exhibit L referenced an April 22, 2011, letter to plaintiff National Security Counselors from the Department of Justice ("DOJ"), Office of Information Policy ("OIP"), in which OIP provides a detailed explanation of the FBI's fee policy regarding production of responsive records on CDs. *See* 1<sup>st</sup> Hardy Decl. at ¶ 18, Exhibit L. The referenced April 22<sup>nd</sup> letter is attached hereto as **Exhibit A**.

(6) In my first declaration, I explained that the FBI's policy regarding production of responsive records on CDs derives from and/or is the FBI's effort to comply with three DOJ FOIA regulations – 28 C.F.R. §§ 16.5(b), 16.6(b), and 16.11(c)(2). *See* 1<sup>st</sup> Hardy Decl., ¶ 33. To clarify, § 16.5(b) provides that components may establish multiple processing tracks that distinguish between simple and complex requests, based on the amount of work and/or time needed to process the request, and § 16.6(b) provides that components shall provide written notice to a requester of any fees being charged for processing a FOIA request and upon receipt of payment of applicable fees, shall promptly disclose responsive material to the requester. The FBI developed its CD policy based upon, and in an effort to comply with, these regulations, as well as § 16.11(c)(2), as more fully described and explained in my first declaration. *See* 1<sup>st</sup> Hardy Decl., ¶ 33.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, and that Exhibit A attached hereto is a true and correct copy.

Executed this 31<sup>st</sup> day of December 2013.

  
DAVID M. HARDY  
Section Chief  
Record/Information Dissemination Section  
Records Management Division  
Federal Bureau of Investigation  
Winchester, Virginia

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
NATIONAL SECURITY COUNSELORS, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civ. A. No. 1:13-cv-00556-RC
	)	
DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
_____	)	

**SECOND DECLARATION OF DAVID M. HARDY**

**Exhibit A**



U.S. Department of Justice

Office of Information Policy

Telephone: (202) 514-3642

Washington, D.C. 20530

APR 22 2011

Kel McClanahan, Esq.  
National Security Counselors  
Suite 124  
1200 South Courthouse Road  
Arlington, VA 22204

Re: Appeal No. AP-2011-00113<sup>1</sup>  
JGM:MTC

Dear Mr. McClanahan:

You appealed from the action of the Federal Bureau of Investigation on the handling of your request for access to records concerning ten individuals and organizations listed in your initial request and referred to in your letter as "parties."

Your appeal concerns multiple issues: 1) your entitlement to 100 free pages and two hours of search per request; 2) the FBI's practice of "limiting" CD-ROMs to 500 pages per CD-ROM; 3) its practice of providing you with a separate CD-ROM for each of the subjects of your request; 4) its charging of a cost of \$15.00 per CD-ROM; and 5) what you characterize as its decision to aggregate the fees for the subjects of your request. Further you challenge the adequacy of the search conducted by the FBI for those subjects identified in your appeal letter as Request Nos. 1400405-002 (Scott Hodes), 11400406-002 (James Madison Project), and 11400412-002 (National Security Counselors). All fee matters are addressed in this appeal response; your challenge to the adequacy of the FBI's search for three of the subjects will be addressed in a separate letter.

After careful consideration of your appeal and as a result of discussions between FBI personnel and this Office, I am granting your appeal in part. The FBI and this Office are in agreement that the cost of the first CD-ROM for any request should reflect a deduction made for the cost equivalent of 100 pages of records (currently \$10.00) in consideration of the statutory

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<sup>1</sup> Your appeals are numbered AP-2011-00113 through AP-2011-00119 based on the seven request numbers provided in the subject line of your appeal. The corresponding FBI Request Nos. are 1140395, 1140405, 1140406, 1140408, 1140411, 1140412, and 1140416, each of which has the "002" extension. I note that you mention in the body of your appeal letter that "[you] would close completely" an eighth FBI request, No. 1140411-002. (K. McClanahan letter to Office of Information Policy dated October 17, 2010 at 2.) Not accounted for in your appeal letter are FBI requests numbered 1140403 and 1140421. It is presumed that the subject matters associated with these two numbers are not in contention.

FBI ABR  
4/29/11



-2-

provision providing certain requesters with 100 pages at no cost per request (when aggregation is not an issue). This would mean that for any request where a single CD-ROM is released and there is no search time to be charged, there would be no cost to the requester for that CD-ROM.<sup>2</sup> In instances where in response to a request, multiple CD-ROMs are released, the \$10.00 "cost equivalent" deduction would be taken from the cost of the first CD-ROM. Further, you are also entitled to two free hours of search per request (except as limited below). To the extent that the FBI's estimated search fee did not account for the two hours of search time to which you are entitled at no cost, the total fee owed will likewise be adjusted to reflect a deduction for the cost of two hours of search time.

I am otherwise affirming the FBI's determination. You raise a concern with regard to the FBI's practice of loading approximately 500 pages onto each CD-ROM released. The 500-page limit was established by the FBI both to facilitate the making of interim releases and to ensure an efficient FOIA process. The FBI has reasonably determined that the approximate minimum number of pages for one subject that will be saved to a CD-ROM as part of an interim release is 500 pages. The FBI does not abruptly stop loading records onto a CD-ROM once it reaches 500 pages. Through many years of experience and experimenting with workload distribution, in addition to consideration of its computer system capabilities, the FBI has developed a system for processing records that maximizes efficiency and provides responsive records to the largest number of requesters in the shortest amount of time. The FBI, for instance, has found that it is much more efficient to divide multi-subject requests among more than one processor rather than to assign such a request to one individual. This is a benefit to both the component and the requester. It likewise strives to make interim releases for large-volume requests. While 500 pages is an approximate number of pages to be included on each CD-ROM, that number generally varies with each release. As but one example, one of the subjects of your request received a release of 679 pages on a single CD-ROM. Thus, placing an approximate number of pages (500) on each CD-ROM moves records through the various processing stages more quickly and efficiently.

Likewise placing a limit on the number of subjects per CD-ROM makes processing multiple-subject requests, such as yours, much easier, especially when more than one processor is assigned to a multi-subject request. Rather than "sharing" a single CD-ROM, multiple processors process and download discrete subjects onto separate CD-ROMs, not for the purpose as you suggest of "maximizing the amount of money [you] would have to pay," but to process the records and get them to you as quickly as possible. Providing a tracking number for each of the subjects of a multi-subject request enhances the ability to provide information quickly to supervisors as well as to inform requesters of the status of a particular subject. Accordingly, I find that the FBI's 500-page minimum and its practice of placing separate subjects on separate CD-ROMs is reasonable.

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<sup>2</sup> This determination takes into account both a deduction for the cost equivalent of 100 pages (\$10.00) as well as the Department's threshold of \$14.00, at or below which no fee is charged. See 28 C.F.R. § 16.11(d).

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As you are likely aware, Department regulations, based on the guidance provided by the Office of Management and Budget,<sup>3</sup> provide for the assessment of "direct costs" when a medium other than paper is used. "For copies produced by computer . . . components will charge the direct costs, including operator time, of producing that copy. For other forms of duplication, components will charge the direct costs of that duplication." 28 C.F.R. § 16.11(c)(2); see also 28 C.F.R. § 16.11(b)(2). Nonetheless, the FBI has not passed all of the "direct costs" of preparing a CD-ROM for release on to the requester. It is my understanding that none of the costs associated with scanning responsive documents into a pdf file prior to loading records onto a CD-ROM have been passed on to any requester. Additionally, because all FBI FOIA requests are processed on its classified computer network, when a CD-ROM is prepared for release, it must undergo a more stringent process than simply saving the information to a CD-ROM. The CD-ROM must be run through an additional software application before it can be released and the cost of running this application (which takes approximately one hour for a 500-page release) exceeds the \$15 fee assessed by the FBI per CD-ROM. Accordingly, I find that the \$15 fee charged by the FBI per CD-ROM is reasonable.

Please be assured that there is no financial incentive for the FBI to use more than one CD-ROM. As I am sure you know, all FOIA fees collected are ultimately deposited into the United States Treasury and not into individual agency accounts. See Uniform Freedom of Information Act Fee Schedule and Guidelines [hereinafter OMB Guidelines], 52 Fed. Reg. 10012 (Mar. 27, 1987) ("funds agencies receive for providing FOIA services are to be deposited in the general revenues of the United States rather than individual agency accounts").

In your challenge to what you claim is the FBI's aggregation of the multiple subjects of your single request for purposes of determining the number of free pages to which you are entitled, you suggest that this issue has already been decided in this Office's letter dated May 20, 2010. That letter, written in response to your fee waiver/fee category appeal, made no determination on any aggregation issue as the issue was not raised by you in that appeal. As support for your position you refer to a sentence in the second to last paragraph of that letter which stated that "NSC is a non-commercial, non-media requester and is entitled to two free hours of search time and one hundred free pages of responsive records per request." That statement is accurate; your interpretation of it, however, is incorrect. As a non-commercial entity and non-media requester your organization is entitled to certain free services per request. The answer to the question you now raise hinges on whether you submitted a single request or multiple requests to the FBI. By your own hand you describe your single letter as "a request" for records on "ten parties." I concur.

The FBI, upon receipt of your single request, assigned each of the ten subjects a separate FOIPA number for purposes of tracking, administrative convenience, and processing efficiency. These administrative considerations do not transform your single request into multiple unrelated

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<sup>3</sup> OMB Fee Guidelines can be found at 52 Fed. Reg. 10012 (Mar. 27, 1987). See, e.g., 52 Fed. Reg. at 10017-18.

-4-

requests for purposes of determining the number of free pages to which you are entitled. See 28 C.F.R. § 16.11(h) (2010); see also OMB Guidelines, Sec. 9c, 52 Fed. Reg. at 10020. Further, had you submitted ten separate letters to the FBI, each for a different individual or organization, but for the same types of records for each, under Department regulations, I would have considered them as a series of related requests and allowed aggregation under the Department regulation cited to immediately above.

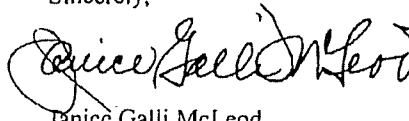
In sum, you are entitled to receive the benefit of the "cost equivalent" of 100 pages of records if you choose to receive responsive records on a CD-ROM. You are likewise entitled to two free hours of search time. The cost equivalent will be applied to each request submitted by you unless aggregation applies with regard to multiple requests. In this instance because you submitted a single request, albeit with multiple subjects, each of which were assigned separate FOIPA numbers simply for tracking purposes, processing efficiency, and administrative convenience, you are entitled to 100 free pages and two hours search for this single request.

Please be advised that this Office's decision was taken only after a full review of this matter. Your appeal was assigned to an attorney with this Office who thoroughly reviewed and analyzed your appeal, your underlying request, and the actions of the FBI in response to your request.

If you are dissatisfied with my action on your appeal, the FOIA permits you to file a lawsuit in federal district court in accordance with 5 U.S.C. § 552(a)(4)(B).

For your information, the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; e-mail at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 301-837-1996; toll free at 1-877-684-6448; or facsimile at 301-837-0348.

Sincerely,



Janice Galli McLeod  
Associate Director

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY COUNSELORS, *et al.*,

Plaintiffs,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

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Civ. A. No. 1:13-cv-00556-RC

**THIRD DECLARATION OF DAVID M. HARDY**

I, David M. Hardy, declare as follows:

(1) I am the Section Chief of the Record/Information Dissemination Section (“RIDS”), Records Management Division (“RMD”), in Winchester, Virginia. I have held this position since August 1, 2002. Prior to my joining the Federal Bureau of Investigation (“FBI”), from May 1, 2001 to July 31, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act (“FOIA”) policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the State of Texas since 1980.

(2) In my official capacity as Section Chief of RIDS, I supervise approximately 248 employees who staff a total of ten (10) Federal Bureau of Investigation Headquarters (“FBIHQ”) units and two (2) field operational service center units whose collective mission is to effectively plan, develop, direct, and manage responses to requests for access to FBI records and information pursuant to the FOIA as amended by the OPEN Government Act of 2007 and the OPEN FOIA

Act of 2009; the Privacy Act of 1974; Executive Order 13526; Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to Plaintiff's request for information pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a. Specifically, I am aware of the treatment that has been afforded National Security Counselor's FOIA request for the Manual of Administrative Operations and Procedures ("MAOP"), as well as RIDS' decisions about fees with respect to all three FOIA requests at issue in this lawsuit. I am also aware of the protocol adopted and followed by RIDS for assessing and charging fees associated with processing FOIA requests and issuing releases on compact discs ("CD").

(4) The FBI submits this declaration in response to the United States Court of Appeals' ("USCA") remand on the issue of fee assessment. More specifically, it addresses whether the \$15.00 assessed fee exceeds direct costs. The Court "require[s] only that the agency provide a sufficient factual basis upon which the district court can make the determination that the fees assessed under the interim release policy do not exceed direct costs." *See* USCA's Opinion dated February 14, 2017, p. 10. First, I will describe the Integrity process in greater detail, as well as the steps for preparing a release on CD. Second, I will explain the direct costs associated with a CD release and how those costs exceed the \$15 assessed fee. This is my third declaration and the FBI's fourth overall declaration in this case. It incorporates all previous declarations

dated September 17, 2013 (hereinafter “First Hardy Declaration”), December 3, 2013 (hereinafter “Second Hardy Declaration”), and March 14, 2014 (hereinafter “First Argall Declaration”).

## **I. INTEGRITY PROGRAM AND EMPLOYEE ENGAGEMENT**

### **A. Integrity Program**

(5) The Court states “the Hardy Declaration’s explanation of the Integrity program lacks adequate specificity to determine whether, and to what extent, the 50-minute period for running the program involves employee engagement rather than idle time.” *Id* at 9. In response, the FBI provides greater detail herein regarding the Integrity program and the employee involvement required in preparing and conducting a security scan.

(6) As stated in the First Hardy Declaration, the process by which the FBI produces a CD to a requester involves running a security protocol utilizing the Integrity program in which the FBI moves records from its FOIA Document Processing System (“FDPS”), which is a classified computer network on which records responsive to FOIA requests are processed, to a non-classified computer network from which a CD can be prepared for release. As stated in the First Hardy Declaration, RIDS personnel expends approximately 50 minutes to conduct a security scan through the Integrity program. *See* First Hardy Decl. ¶ 33(d) n. 18. This is a good-faith estimate of the entire Integrity process from preparing the text documents to resolving issues noted in the reports. The Integrity process entails the following major steps which require individual action, review and analysis: (1) document conversion, (2) Integrity scan, and (3) resolution of issues.

**i. Document Conversion**

(7) First, the Government Information Specialist (“GIS”) must export each section of the release from FDPS to their local computer drive. A release can include multiple sections. The GIS must export each section as a multi-page TIF<sup>1</sup> file. The GIS renames each section and saves them to the common shared drive. Integrity is unable to read TIF files so each page must be converted into single-page text documents. The GIS’ computer is unable to convert the files; therefore, this part of the conversion is performed on designated computers. The GIS retrieves the sections and saves each page as a single-page text document onto the shared drive. This completes the conversion process. The GIS then retrieves the text documents from the shared drive and saves them to their local drive in preparation of the Integrity scan.

**ii. Integrity Scan**

(8) Second, the GIS prepares for the Integrity scan. As previously stated, the Integrity program uses two policies when conducting a scan – a general security policy and a custom policy. *See* First Hardy Decl. ¶ 33(c). The general security policy is comprised of standard code words used in every scan; however, the custom policy is created by the GIS and unique to each specific FOIA request. The custom policy requires analysis and an independent assessment by the GIS based on the GIS’ knowledge of the case and relevant context. The GIS must identify, develop, and implement case specific key words which includes a variety of exempt words, names, confidential sources, symbol source numbers, classified techniques, and any other terms deemed sensitive or classified. The GIS reflects upon the processed records, notes all sensitive or classified terms, and includes them in creating the custom policy.

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<sup>1</sup> TIF or TIFF stands for “Tagged Image Format File.” TIF is an image format file for high-quality graphics.

(9) The GIS imports the custom policy into the Integrity program, and scans it against each text document. After the scan is finished, the GIS must conduct a manual review of the results. Specifically, the scan produces an Integrity report indicating a pass or fail result. If Integrity produces a pass report, then the GIS can proceed with preparing the release package; however, a fail requires the GIS to review and resolve each issue. Both the automated scan and manual review are necessary to ensure information is ready to be outputted from the classified FDPS environment to an unclassified information environment suitable for public dissemination and to prevent the inadvertent release of sensitive or classified information.<sup>2</sup> The GIS follows the same process in conducting a scan of the general security policy against each single-page text document, which produces a second report. The GIS must run the two scans (the scan using the custom policy and the scan using the general security policy) separately, review each report, and resolve any issues or “fails” identified in the reports.

### iii. **Issue Resolution**

(10) Third, the GIS must resolve all issues or “fails.” The reports list every instance in which a word, from the custom or general policy, is detected as un-redacted within the text documents. The reports generate a significant number of “false” fails that are random and incomplete references to unrelated individuals or subjects. For example, if the general or custom policies list the term “DEA” for Drug Enforcement Administration, then every instance of this letter sequence; i.e., “**deaf**,” “**death**,” “**dead**,” “**dean**,” “**deal**,” “**dear**,” will result in a fail. The reports can produce numerous fails resulting in considerable work because the GIS must review each fail, comparing it to the corresponding page in FDPS, and determine whether it is a true or

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<sup>2</sup> An inadvertent release is an accidental or unintended release of exempt information.



false fail. The GIS must ensure each release of the word is correct and not inadvertent.<sup>3</sup> Finally, if the GIS determines the fail is, in fact, an inadvertent release, then the identified error must be corrected on the relevant pages in FDPS and the entire Integrity process starts over.

**B. Burning a CD and Preparing the Release Package**

(11) After resolving issues, the GIS proceeds with preparing the release package by exporting all sections from FDPS into an unclassified PDF format outside FDPS. Each section is then transferred from the external FDPS location to a software program used for authoring CDs. After the CD is burned, the GIS prepares the physical release package.

**II. DIRECT COSTS EXCEED ASSESSED FEE**

(12) The Court states “[w]e require only that the agency provide a sufficient factual basis upon which the district court can make the determination that the fees assessed under the interim release policy do not exceed direct costs.” *See* USCA’s Opinion dated February 14, 2017, p. 9. As such, the FBI explains the direct costs associated with preparing and conducting the Integrity protocol.

(13) Integrity protects the transfer of information from a classified network to an unclassified format. It is a multi-step information security review which requires considerable employee engagement. As described above, the GIS is active through a majority of the process. Again, the FBI provided an estimate of 50 minutes to perform the Integrity scan. *See* First Hardy Decl. at ¶ 33(d) n. 18. This is a good-faith estimate based on experience, the number of necessary steps, and the amount of work required by the GIS to complete each step. Each step must be performed by the GIS despite the size of the release. It is the level of GIS engagement;

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<sup>3</sup> Words can be released in certain instances and not in others depending on context, segregability, and foreseeable harm to an interest protected by an exemption.

i.e., the direct labor costs, which underpin the \$15 assessed fee.

(14) The direct labor costs associated with running Integrity exceed \$15.00. As stated in the First Hardy Declaration, the average GIS responsible for preparing and running Integrity range in grade from GS-11 to GS-13. *Id.* Based on the 2013 Salary Table issued by the Office of Personnel Management for the Washington, D.C. locality, the minimum hourly salary is \$29.93 per hour (GS-11, Step 1) and the maximum is \$55.46 (GS-13, Step 10). *Id.* Thus, the average direct labor cost associated with a 50-minute Integrity scan for a GS-11, Step 1 is \$24.50 and a GS-13, Step 10 is \$46.00. These figures do not include labor costs for burning the CD or preparing the physical release package, as well as other direct costs such as CDs, postage, envelope, etc. These totals are based on 2013 salary rates and, though the \$15 CD fee has not changed since 2013, the government employees' yearly salary has increased. Despite the increase in labor costs, the FBI has maintained its policy of \$15 per CD. Thus, the direct costs associated with a CD release exceeds the assessed fee.

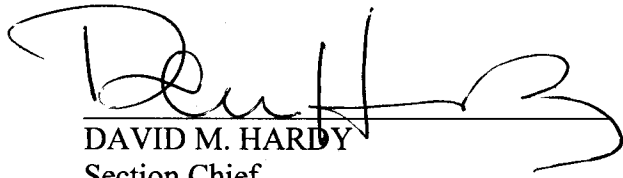
### **CONCLUSION**

(15) The purpose and function of the Integrity program is to ensure information is ready to be transferred from a classified FDPS environment to an unclassified information environment suitable for public dissemination, and to prevent the inadvertent release of sensitive or classified information. As explained above, the Integrity process is a multi-step security review which requires considerable employee engagement. It is the level of GIS engagement which underpins the \$15 assessed fee. The Court requested the FBI to "provide a sufficient factual basis upon which the district court can make the determination that the fees assessed under the interim release policy do not exceed direct costs." *See* USCA's Opinion dated February 14,

2017, p. 10. In response, the FBI provided an in-depth description of the Integrity process and the high level of required employee engagement, as well as explained how the direct costs associated with a CD release exceed the \$15 assessed fee.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 7<sup>th</sup> day of June 2017.

A handwritten signature in black ink, appearing to read 'D. Hardy', written over a horizontal line.

DAVID M. HARDY  
Section Chief  
Record/Information Dissemination Section  
Records Management Division  
Federal Bureau of Investigation  
Winchester, Virginia